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

Form #1

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

## NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: §§23-1-1a(j)(3), 23-2-9(i)

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ______

TITLE OF RULE BEING AMENDED: ______

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 19

TITLE OF RULE BEING PROPOSED: Self Insurance Risk Pools

DATE OF PUBLIC HEARING: April 14, 2004 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209

Charleston Civic Center
Charleston, West Virginia
*The comment period expires at the conclusion of the public hearing.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T. J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
~~4700 MacCorkle Ave., S.E.~~
Charleston, WV 25304
Fax # (304) 926-5372

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

$4.40

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

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

February 17, 2004

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

Re: Proposed Rule
Title 85, Series 19
"Self Insurance Risk Pools"

Dear Secretary Manchin:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 19 entitled, "Self Insurance Risk Pools," for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

G. A. Burton

Gregory A. Burton
Executive Director

Enclosure

**SUMMARY OF PROPOSED RULE**
**STATEMENT OF CIRCUMSTANCES**
**TITLE 85, SERIES 19**
**SELF INSURANCE RISK POOLS**

This exempt legislative rule provides for the creation and funding of two risk pools for the benefit of self-insured employers to assist in securing the obligations of bankrupt and default self-insured employers.

The Security Pool is established to pay claims of bankrupt and default self-insured employers with dates of injury prior to July 1, 2004.

The Guaranty Pool is established to pay claims for bankrupt and default self-insured employers with dates of injury on or after July 1, 2004.

The rule requires participation in the program by self-insured employers. The rule requires that self-insured employers obtain security for certain claims and provides for alternate security payment in the event the self-insured employer is under-secured. The rule provides for the funding of each pool.

The rule complies with the provisions of W. Va. Code § 23-2-9(i).

**FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES**

Rule Title: Title 85 Series 19: Self Insurance Risk Pools

Type of Rule: X Legislative Exempt ___Interpretive __Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Ave. S.E.

Charleston, WV 25304

## 1. Effect of Proposed Rule

| | Annual | | Fiscal Year | | |
|---|---|---|---|---|---|
| | INCREASE | DECREASE | CURRENT | NEXT | THEREAFTER |
| ESTIMATED TOTAL COST | Unknown | Unknown | Unknown | Unknown | Unknown |
| PERSONAL SERVICES | 0 | 0 | 0 | 0 | 0 |
| CURRENT EXPENSE | 0 | 0 | 0 | 0 | 0 |
| REPAIRS & ALTERNATIONS | 0 | 0 | 0 | 0 | 0 |
| EQUIPMENT | 0 | 0 | 0 | 0 | 0 |
| OTHER: | | | | | |
| Benefit payments | Unknown | Unknown | Unknown | Unknown | Unknown |
| Benefit related payments | Unknown | Unknown | Unknown | Unknown | Unknown |

## 2. Explanation of above estimates:

Implementation of this rule will result in the Commission initially segregating funds of $10,000,000 for the Security Pool. The Security Pool shall pay claims for bankrupt and default self-insured employers with dates of injury prior to July 1, 2004. The Guaranty Pool shall pay claims for bankrupt and default self-insured employers on or after July 1, 2004. Both pools, together with their earnings, cannot be expended for any other purposes. An undetermined amount in benefit and benefit related payments might have to be paid from these pools. These payments would be contingent on the actual number of default and bankrupt self-insured employers that occur, together with the adequacy of their security and the amount of their future claims benefits at the time of their default or bankruptcy. Due to the unpredictable nature of these types of occurrences, the annualized amount of these potential payments cannot be reasonably estimated.

**Rule Title:** Title 85 Series 19: Self Insurance Risk Pools

**3. Objectives of this rule:**

This rule creates and defines the funding of two risk pools to secure the obligations of self-insured employers.

**4. Explanation of Overall Economic Impact of Proposed Rule.**

**A. Economic Impact on State Government.**

It is expected that this rule will help to simplify the efforts required in reviewing and maintaining the surety required for the obligations of self-insured employers.

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

It is expected that this rule will help secure the obligations of existing self-insured employers and also facilitate the process required for any potential employers who may want to become self-insured.

**C. Economic Impact on Citizens/Public at Large.**

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

**Date:** 02-18, 2004

**Signature of Agency Head or Authorized Representative**

Greg A. Burton

Gregory A. Burton
Executive Director, Workers' Compensation Commission

**TITLE 85**
**EXEMPT LEGISLATIVE RULE**
**WORKERS' COMPENSATION COMMISSION**

**SERIES 19**
**SELF INSURANCE**
**RISK POOLS**

**§85-19-1. General.**

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

1.2. Authority. -- W.Va. Code §§23-1-1a, 23-2-4; 23-2-9(i). Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission are not subject to legislative approval as would otherwise be required under West Virginia Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. –

**§85-19-2. Purpose of Rule.**

This rule provides for the creation and funding of two risk pools 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 codified at W. Va. Code §23-1-1 et seq.

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

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

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

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

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

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

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

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

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

3.11. "Payments" are obligations of the employer for the purposes of this rule including, but not limited to, the payment of premium taxes, the payment of premium deposits, the payment of any obligations due to be paid by an employer authorized by the commission to be a self-insurer, and late reporting and payment penalties, interest.

3.12. "Premium" and "premium tax" mean the amounts of money due from an employer to the Fund or commission as a result of quarterly and other periodic assessments by the commission under the provisions of the Act in order to establish, maintain, and replenish the Fund and to pay the expenses of administration of the Fund by the commission. "Premium" and "premium tax" includes, but is not limited to, assessments of: premium tax, premium deposit and interest, assessed to all employers; and also, that portion of self-insured premium tax required to be paid by the employer for the benefit of the employer's claimant employees as required by law.

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

3.14. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.15. "This rule" means this legislative rule designated as 85 C.S.R. 19, "Self Insurance Risk Pools."

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

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

4.2. The Commission shall establish a Security Pool. The Security Pool shall pay claims for bankrupt and default self-insured employers with dates of injury prior to July 1, 2004.

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

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

4.3. The Commission shall establish a Guaranty Pool. The Guaranty Pool shall pay claims for bankrupt and default self-insured employers with dates of injury on or after July 1, 2004.

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

b. The Commission 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 inactive self-insured employers having active claims shall participate in the Security Pool.

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

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

**§85-19-6. Surety Requirements.**

6.1. All employers who participate in the Security Pool must fully secure their liabilities as of June 30, 2004, with the exception of those that meet the following criteria:

a. Employers that have been complying, and continue to comply with a Commission approved security installment increase plan; or

b. Employers that meet the eligibility requirements and pay the alternate security surcharge as provide in section seven of this rule.

6.2. New self-insured employers who were previously regular subscribers must secure their liability up through June 30, 2004 or must pay the Commission an amount equal to the liability amount attributable to periods through June 30, 2004, including incurred but not reported liabilities.

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

a. Existing surety using old bond language will be credited to the employer at the estimated actual value of the bond as determined by the Commission's actuary.

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

a. The Commission may require additional surety for claims with dates of injury on or after July 1, 2004 or permit the employer to pay the alternate surety surcharge in the manner prescribed in the requirements for under-secured self-insured employers if it is determined that an employer's financial condition has deteriorated compared to the previous year's financial analysis by the Commission. The employer's financial condition will be analyzed using objective benchmarks to determine a deteriorating financial condition as provided in the rule governing self-administration of self-insurance.

**§85-19-7. Under-secured self-insured employers.**

7.1. Self-insured employers who are not fully secured as of June 30, 2004 may be eligible to pay an alternate surety surcharge into the Security Pool. The alternate security surcharge shall not be applicable to those employers that are successfully meeting installment increases in security, as describe in subsection 6.1.

7.2. Eligibility. To be eligible to pay the alternate surety surcharge, the under-secured self-insured employer must provide evidence that it is unable to obtain the required amount of surety. Upon receipt of the evidence provided by the self-insured employer, the Commission shall take the following steps:

a. The Commission shall secure a financial consultant knowledgeable in the surety market to verify the employer's evidence of their inability to obtain surety.

b. The consultant shall make a recommendation to the Commission as to whether the employer should be permitted to pay the alternate surety surcharge instead of providing surety.

7.3. Surcharge. The alternate surety surcharge shall be based on the individual self-insured employer's commercial cost of surety if it were commercially available to that employer.

a. The consultant engaged for the purpose of assisting the Commission in determining eligibility for this surcharge shall also make a recommendation to the Commission regarding the individual self-insured employer's commercial cost of surety, if available.

7.4. Determinations. Upon receipt of the financial consultant's recommendations, the Commission shall render a decision regarding the eligibility of the self-insured employer for the alternate surety surcharge and the amount of the surcharge.

7.5. The alternate surety surcharge is in addition to the required assessments to fund the Guaranty Pool.

**§85-19-8. Security Pool Funding.**

8.1. 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. Proceeds from any alternate security surcharge;

c. Proceeds received from assessments pursuant to chapter twenty-three of the West Virginia Code;

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

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

8.2. The initial funding for the Security Pool shall be ten million dollars ($10,000,000.00).

8.3. Should the proceeds identified in subsection 8.1 be inadequate to fully satisfy the obligations of the Security Pool, the Executive Director and the Board of Managers shall identify and pursue such alternative funding as shall be necessary.

**§85-19-9. Guaranty Pool Funding.**

9.1. In order to initially fund the Guaranty Pool, the Commission shall assess self-insured employers.

a. Assessments shall be equal to 2% of the self-insured employer's preceding fiscal year's annual claims indemnity payments, less settlements, or a minimum of $5,000 whichever is greater. Assessments shall continue until the initial funding level of the Guaranty Pool is met.

9.2. The initial funding level for the Guaranty Pool shall be ten million dollars ($10,000,000).

a. The initial funding level represents approximately two (2) times the payments made during calendar year 2003 for bankrupt and defaulted self-insured employers.

9.3. After the initial funding level is reached, the Guaranty Pool shall be funded at a level equal to two (2) times the previous year's payout from the Guaranty Pool.

a. The Commission shall assess self-insured employers to fund the Guaranty Pool in any fiscal year in which the aggregate proceeds for the Guaranty Pool are less than the required funding level.

b. Assessments shall be equal to 2% of the preceding year's annual claims indemnity payments, less settlements, or a minimum of $5,000 whichever is greater.

9.4. Employers who become self-insured after the establishment of the Guaranty Pool will be assessed an amount equal to 5% of the preceding year's base-rated premium, or a minimum of $5,000 whichever is greater, for a period of 3 years. Thereafter, assessments shall be made as needed in accordance with the same methodology utilized for other self-insured employers.

**§85-19-10. Converting to Regular Subscriber Status.**

Active self-insured employers who become regular subscribers or inactive, either voluntarily or involuntarily on or after July 1, 2004, and who do not buy out their liability shall leave all existing surety in place and shall continue to be assessed the Security Pool and Guaranty Pool assessments for a period of ten (10) years. This provision is not to be construed as excusing any obligation of a terminated self-insured employer imposed by the Act or by other rules of the Commission.

**§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 effect the provisions or the applications of these rules which can be given affect without the invalid provisions or application and to this end the provisions of these rules are declared to be severable.