

## Notice of Rulemaking Hearing

### Department of Commerce and Insurance Division of Insurance

There will be a hearing before the Commissioner of Commerce and Insurance to consider the promulgation of the amendments of rules in Chapter 0780-01-83. The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, T.C.A. § 4-5-204 and will take place in Conference Room A on the Fifth Floor of the Davy Crockett Tower located at 500 James Robertson Parkway in Nashville, Tennessee at 10:00 a.m. CST on the 18th day of September, 2007.

Any individuals with disabilities who wish to participate in these proceedings (to review these filings) should contact the Division to discuss any auxiliary aids of services needed to facilitate such participation. Such initial contact may be made no less than ten (10) days prior to the scheduled meeting date (the date the party intends to review such filings), to allow time for the Division to determine how it may reasonably provide such aid or service. Initial contact may be made with Don Coleman, the Department's ADA Coordinator, at 500 James Robertson Parkway, Fifth Floor, Nashville, Tennessee 37243, telephone (615) 741-0481.

For a copy of this notice of rulemaking hearing, contact: Karen L. Heidel, Staff Attorney, Department of Commerce and Insurance, Davy Crockett Tower, Twelfth Floor, 500 James Robertson Parkway, Nashville, Tennessee 37243, telephone (615) 741-2199.

### Substance of Proposed Rules

#### Chapter 0780-01-83 Self-Insured Workers' Compensation Single Employers

#### Amendments

0780-01-83-.02 Definitions is amended by adding the following as a new appropriately designated paragraph (7) and renumbering all subsequent paragraphs accordingly, and adding the following as a new appropriately designated paragraph (21) and renumbering all subsequent paragraphs accordingly:

- (7) "Governmental entity" means any political subdivision of the state of Tennessee including, but not limited to, any municipality, metropolitan government, county, utility district, volunteer fire department receiving funds appropriated by a county legislative body or a legislative body of a municipality, human resource agency, public building authority, and development district created and existing pursuant to the constitution and laws of Tennessee, or any instrumentality of government created by any one (1) or more of the named local government entities of by an act of the general assembly.
- (21) "SIR" means self-insured retention, which is the portion of the risk assumed by the self-insured Employer.

0780-1-83-.04 Application for Certificate of Authority is amended by deleting the rule in its entirety and replacing it with the following language:

- (1) To apply for a Certificate of Authority, an Employer shall file with the Commissioner an application on a form adopted by the Commissioner, accompanied by a non-refundable filing fee as set under T.C.A. § 56-4-101(a)(1). A person in this state applying for a Certificate of Authority to act as an Employer shall, under penalty of refusal, suspension

or revocation of the certificate of authority, declare therein that the statements made in the application are true, correct and complete to the best of the person's knowledge and belief.

- (2) An application of an Employer or prospective Employer shall include the following documentation, together with such other information or documentation as the Commissioner may require:
  - (a) Financial statements.
    1. The last three (3) Form 10-K's filed by the Employer with the U. S. Securities and Exchange Commissioner, if such Employer files such 10-K's; and
    2. The Employer's independently audited financial statements according to Generally Accepted Auditing Standards of the American Institute of Certified Public Accountants with the accompanying footnotes and the auditor's opinion for the preceding three (3) fiscal years. The commissioner may consider only assets that would be admitted by NAIC's Accounting Practices and Procedures Manual when evaluating an applicant's financial statement.
  - (b) Loss history.
    1. Documentation evidencing the applicant's loss history to include the following:
      - (i) The applicant's organizational structure and management background;
      - (ii) The applicant's profit and loss history for the past three (3) years;
      - (iii) The applicant's workers' compensation loss history for the past three (3) years; and
      - (iv) The number of Employees employed by the applicant and/or affected by the applicant's self-insurance program.
  - (c) Administration.
    1. A plan for claims administration that is acceptable to the Commissioner and that designates a third party administrator.
      - (i) An Employer may not contract for services with a third party administrator unless the third party administrator holds a certificate of authority issued by the Commissioner pursuant to any applicable statutes or rules.
    2. Copies of each contract entered into with a person that provides claims services, underwriting services, or accident prevention services if the provider of those services is not an Employee of the applicant.
- (3) The commissioner shall evaluate the information contained in the application required to be filed under this Rule to assure that no gaps in funding exist and that funds necessary

to pay the financial obligations of the Employer will be available on a timely basis. The commissioner may, in addition to any other factors set forth in this Chapter, consider the following factors in reviewing an application for a certificate of authority under this Rule:

- (a) The applicant's organizational structure and management background;
  - (b) The applicant's profit and loss history;
  - (c) The applicant's workers' compensation loss history;
  - (d) The source and reliability of the financial information submitted by the applicant;
  - (e) The number of Employees affected by self-insurance;
  - (f) The applicant's access to excess insurance markets;
- (4) To obtain a certificate of authority, the financial statements submitted to the Department must demonstrate that the applicant has:
- (a) Positive working capital; and
  - (b) Net worth that is twenty (20) times the Employer's SIR.
- (5) If an applicant is a subsidiary, the applicant's parent organization must guarantee the obligations imposed on the applicant by this Chapter and the Tennessee workers' compensation obligations as contained in T.C.A. § 50-6-405(a).
- (6) The Commissioner may require any documents from the Employer necessary to verify the information contained in an application.

0780-01-83-.05 Security Deposit Requirements is amended by deleting the Rule in its entirety and replacing it with the following language:

- (1) Each Employer shall provide security for incurred liabilities for compensation through a deposit with the Commissioner in the following forms:
  - (a) Negotiable securities;
  - (b) Surety bonds;
  - (c) Certificates of deposit; or
  - (d) Letters of credit.
- (2) The sum of the securities on deposit with the Commissioner shall be at least equal to the greater of the following:
  - (a) \$500,000;
  - (b) The initial bond amount will be determined by the Employer's experience rating and any other factors the commissioner deems necessary.

- (c) Such other amount determined by the Commissioner to be necessary to provide sufficient security.
- (3) If the commissioner deems the initial security or bond to be inadequate or unsafe, additional amounts may be required. The Department will calculate the continuing bond amount using the following formulas, whichever is greater:
  - (a) Open claims method.
    - 1. If the Employer has a positive working capital, the amount of total outstanding reserves since the Employer became self-insured is multiplied by 1.5. If the Employer has a negative working capital, the total outstanding reserves will be multiplied by 2.0.
    - 2. A factor of two (2) times the SIR will be added if the SIR is over \$500,000.
  - (b) Average paid claims method.
    - 1. If the Employer has a positive working capital, the average of the three (3) most recent years of paid claims is multiplied by 1.5. If the Employer has a negative working capital, the claims amount will be multiplied by 2.0.
    - 2. A factor of two (2) times the SIR will be added if the SIR is over \$500,000.
  - (c) Actuarial opinion method.
    - 1. If the Employer has a positive working capital, the amount of total reserves from the most recent biennial actuarial report multiplied by 1.5. If the Employer has a negative working capital, the reserve amount from the actuarial report is multiplied by 2.0.
    - 2. Reserve amounts for Employers submitting annual actuarial reports will be multiplied by 1.0.
- (4) For purposes of complying with this Rule, Employers that are governmental entities shall only be required to post security in the amount of five hundred thousand dollars (\$500,000).
- (5) The security, or a contract between the Employer, a depository institution and the Commissioner evidencing the security held in said depository institution for purposes of compliance with this Rule, shall be held by the Commissioner and shall be conditioned to run solely and directly for the benefit of the Employees of the Employer.
- (6) Any legal actions to enforce the payment of the security being held for purposes of compliance with this section shall be brought by the Commissioner for the benefit of the Employees of the Employer.
- (7) The security held pursuant to this Rule may be used for the payment of any and all fees or costs required to administer the disbursement of the proceeds to or for the benefit of the Employees.

- (8) The venue for any suit filed by the Commissioner under this provision is in Davidson County, Tennessee.
- (9) Negotiable securities.
- (a) All negotiable securities filed under this Rule shall be the classes of securities listed below and shall be subject to the following requirements:
1. Obligations issued, assumed or guaranteed by any business entity created or existing under the laws of the United States or any state thereof; provided, that the obligation is or the issuing, assuming or guaranteeing business entities' long term obligations are rated one (1) of the four (4) highest grades by any of the nationally recognized statistical rating organizations recognized by the securities valuation office of the National Association of Insurance Commissioners or one (1), two (2) or three (3) by the securities valuation office of the National Association of Insurance Commissioners.
  2. Obligations, not in default as to principal or interest, which are valid and legally authorized obligations issued, assumed or guaranteed by the United States, or by any state thereof, or by any county, city, town, village, municipality or district therein, or by any political subdivision thereof, or by any civil division or public instrumentality of one (1) or more of the foregoing, if, by statutory or other legal requirements applicable thereto, such obligations are payable, as to both principal and interest, from taxes levied, or by such law required to be levied, upon all taxable property or all taxable income within the jurisdiction of such governmental unit or from adequate special revenues pledged or otherwise appropriated or by such law required to be provided for the purpose of such payment, but not including any obligations payable solely out of special assessments on properties benefited by local improvements.
- (b) Before accepting any negotiable security for purposes of this Rule, the Commissioner shall determine whether such negotiable security is suitable for such use. The Commissioner shall consider, as appropriate, the interest rate, credit, liquidity, price, transaction, and other risks associated with such negotiable security.
- (10) Bonds.
- (a) All bonds filed under this Rule shall be issued by an insurer authorized to do business in the state of Tennessee and the insurer shall maintain at least an A rating as determined by the A.M. Best Company.
- (b) Any bond issued by an insurer for purposes of this Rule shall contain a provision requiring the insurer to give the Commissioner ninety (90) days' written notice of its intention to cancel such bond. The insurer shall not cancel such bond until written notice is given to the Commissioner and a copy of such notice is given to the Employer.
- (c) An insurer that cancels a bond issued pursuant to this Rule before the date specified in the written notice as set forth above shall be liable to the Employees of the Employer for any lawful workers' compensation claims that were incurred

on or before the date the bond was cancelled in amounts up to the maximum penal sum of the bond.

(11) Certificates of deposit.

- (a) All certificates of deposit filed under this Rule must be held in a depository institution that is located in the state of Tennessee and is either federally chartered or state chartered.
- (b) If a certificate of deposit is filed with the Commissioner, an agreement shall be entered into between the Commissioner, the depository institution and the Employer pledging the certificate of deposit for the benefit of the Employer's Employees. The agreement shall contain a provision executed between the depository institution and the Employer requiring the Employer and the depository institution to give at least ninety (90) days' written notice of their intention not to renew the certificate of deposit and a provision that, unless written notice not to renew is given to the Commissioner by the Employer and depository institution within ninety (90) days, the certificate of deposit shall be automatically renewed. The Employer shall submit to the Commissioner, on an annual basis, the status of such certificate of deposit, including evidence of its renewal.
- (c) If the Employer and depository institution fail to comply with T.C.A. § 50-6-405(b)(1)(G)(i) or this Rule, the certificate of deposit shall be automatically renewed.
- (d) Any interest accruing on the certificate of deposit while held in the depository institution shall be returned to the Employer at the termination of the certificate of deposit, with the prior written approval of the Commissioner, provided that no claim is due or asserted against the certificate of deposit by the Commissioner.

(12) Letters of credit.

- (a) Any letter of credit filed under this Rule must be issued or guaranteed by a Qualified United States Financial Institution that is located in the State of Tennessee.
- (b) If an Employer elects to secure payment of its workers' compensation claims by way of a letter of credit, an agreement shall be entered into between the Commissioner, the Employer and the depository institution pledging the letter of credit for the benefit of the Employer's Employees and naming the Commissioner as beneficiary under such letter of credit.
- (c) Such letter of credit shall be clean, irrevocable and unconditional and shall contain a provision which requires the issuer to automatically renew such letter of credit unless the issuer shall provide at least ninety (90) days' prior written notice to the Commissioner of an intention to revoke or not renew such letter of credit. The Employer shall annually submit to the Commissioner information regarding the status of such letter of credit, including evidence of its renewal.
- (d) Letters of credit meeting applicable standards of issuer acceptability as of the dates of their issuance or configuration shall, notwithstanding the issuing or confirming institution's subsequent failure to meet applicable standards of

issuer acceptability, continue to be acceptable as security until their expiration, extension, renewal, modification or amendment, whichever occurs first.

- (13) An Employer shall notify the Commissioner if the security no longer meets the requirements of this Rule. Such notice shall be given no later than fifteen (15) days from the time the Employer determines or should have determined that the security no longer meets such requirements.
- (14) Any security held for purposes of compliance with this Rule shall be held for a minimum of ten (10) years after the Employer is no longer self-insured and the Employer shall maintain the fair market value of security on deposit at not less than five hundred thousand dollars (\$500,000), unless otherwise approved by the Commissioner.
- (15) Any security held for purposes of compliance with this Rule shall be in a form substantively that has been previously approved by the Commissioner. Any security that fails to meet any requirement under this section shall not be considered for purposes of determining an Employer's compliance with any of the security maintenance requirements of this Rule.

Authority: T.C.A. §§ 50-6-405(b)(1), 50-6-405(b)(8), 50-6-405(e), and 50-6-405(h).

Rule 0780-01-83-.06 Excess Insurance Requirements is amended by adding the following as a new appropriately designated Paragraph (3):

- (3)
  - (a) Notwithstanding the requirement of Paragraph (1) of this Rule, an Employer may request the commissioner to exempt it from having to obtain excess insurance, either specific or aggregate, by providing on an annual basis documentation that evidences that the coverage is unavailable or that the cost of the coverage outweighs any benefit the coverage would provide to the employees of the Employer.
  - (b) Any request granted under this Paragraph shall be valid for one year. Any Employer receiving an exemption under this Paragraph must annually request a waiver and provide the information required under this Paragraph.

Authority: Tenn. Code Ann. § 50-6-405(b)(8).

Rule 0780-01-83-.08 Reporting Requirements is amended by deleting the Rule in its entirety and replacing it with the following language:

- (1) Every Employer no later than the last day of the sixth month after the end of its immediately preceding fiscal year shall file an annual report with the Commissioner to include the following:
  - (a) Independently audited financial statements according to Generally Accepted Auditing Standards of the American Institute of Certified Public Accountants;
  - (b) Claims information, such as loss run information, in the form and manner prescribed by the Commissioner; and
  - (c) A detailed accounting for reserves for losses outstanding incurred in connection with workers' compensation self-insurance.
  - (d) A renewal application for workers' compensation self-insurance, on a form prescribed by the commissioner.

- (2) Every Employer shall biennially and no later than the last day of the sixth month after the end of its immediately preceding fiscal year file with the Commissioner an opinion from a qualified actuary attesting to the adequacy of the Employer's reserves.
- (3) An Employer that amends its charter, articles of incorporation, or partnership agreement to change its identity or business structure, or in any other manner materially alters its status as it existed at the time of issuance of its Certificate of Authority shall, within thirty (30) days after the amendment or other action, notify the Commissioner of such action and provide the Commissioner with a copy of such amendment or other action.
- (4) An Employer that changes its third party administrator shall notify the Commissioner at least thirty (30) days prior to any such change, and shall file a copy of the contract with its new third party administrator at that time.
- (5) An Employer who declares voluntary bankruptcy or who is placed into involuntary bankruptcy under U.S.C. Title 11 shall notify the Commissioner, in writing, of the filing of a petition for bankruptcy within twenty-four (24) hours of such filing. An Employer shall also so notify the Commissioner of any affiliates of the Employer which have declared bankruptcy or have been placed into involuntary bankruptcy under U.S.C. Title 11. These notices should be sent to the following address: General Counsel, Department of Commerce and Insurance, Davy Crockett Tower, Fifth Floor, 500 James Robertson Parkway, Nashville, Tennessee 37243.
- (6) The commissioner may assess a civil penalty of one hundred dollars (\$100) per day each day any self-insured Employer has failed to comply with any financial record filing requirement. Civil penalties assessed pursuant to this Rule shall be cumulative and in addition to any other civil penalty or remedy available to the commissioner.

Authority: Tenn. Code Ann. §§ 50-6-405(b)(2)(A), 50-6-405(b)(8) and Public Chapter 338.

Rule 0780-01-83-.12 Examinations and Investigations is amended by deleting the language, "but no less than once every five (5) years" from Paragraph (1) of the Rule.

Authority: Tenn. Code Ann. §§ 50-6-405(b)(7)-(b)(8).

Rule 0780-01-83-.13 Suspension or Revocation of Certificate of Authority is amended by adding the following language to the end of Paragraph (1)(a), so that as amended, the paragraph shall read:

- (1)
  - (a) The Employer is in a hazardous financial or operational condition. The Commissioner, in evaluating the financial or operational condition of an Employer, may utilize the criteria contained in Rule 0780-1-66 and Rule 0780-83-.04(3). The Commissioner may consider such other factors in evaluating the financial or operational condition of an Employer deemed to be appropriate. The commissioner may consider only the assets that would be admitted by NAIC's Accounting Practices and Procedures Manual when evaluating an applicant's financial statement.

Authority: Tenn. Code Ann. §§ 50-6-405(b)(2), 50-6-405(b)(4) and 50-6-405(b)(8).

Rule 0780-01-83-.14 Surrender of Certificate of Authority is amended by deleting the Rule in its entirety and replacing it with the following language:



- (1) An Employer may surrender its Certificate of Authority to self-insure at any time with the approval of the commissioner.
  - (a) Employers must submit an opinion from a qualified actuary before surrender can be accepted, unless the commissioner determines that submission of the actuarial opinion is unnecessary.
  - (b) The commissioner shall not grant the request of any Employer to surrender its Certificate of Authority until such time as the Employer has demonstrated to the Commissioner's satisfaction that it has established an adequate program to pay all incurred losses, including unreported losses, that arise out of accidents or occupational diseases first distinctly manifested during the period of self-insurance.
- (2) An Employer whose Certificate of Authority has been revoked, suspended, surrendered or otherwise terminated is not relieved of the obligation for compensation to an Employee for any compensable injury that occurred during the period of self-insurance.
- (3) An Employer who has surrendered its certificate of authority shall submit to the commissioner annual financial statements and loss runs for a period of not less than ten (10) years after the surrender.

Authority: Tenn. Code Ann. §§ 50-6-405(b)(8) and 50-6-405(h).

The notice of rulemaking hearing set out herein was properly filed in the Department of State on the 31st day of July, 2007. (FS 07-28-07; DBID 694)