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Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing. TCA Section 4-5-205

Agency/Board/Commission:	Department of Commerce and Insurance
Division:	Insurance
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Revision Type (check all that apply):

- ☒ Amendment
☐ New
☒ Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here.)

Chapter Number	Chapter Title
0780-01-54	Self-Insured Workers' Compensation Pools
Rule Number	Rule Title
0780-01-54-.02	Definitions
0780-01-54-.04	Application for Certificate of Authority
0780-01-54-.08	Members of the Pool
0780-01-54-.09	Financial Statements and Other Reports
0780-01-54-.11	Premiums and Reserves
0780-01-54-.15	Refunds and Dividends
0780-01-54-.16	Sponsoring Associations (Repeal)
0780-01-54-.20	Examinations and Investigations
0780-01-54-.22	Suspension or Revocation of Certificate of Authority
0780-01-54-.24	Assessments

Chapter 0780-01-54
Self-Insured Workers' Compensation Pools

Amendments

Rule 0780-01-54-.02 Definitions is amended by adding the following as paragraph (4) and renumbering the subsequent Paragraphs accordingly:

- (4) "Declaration" or "declared" for purposes of Rule 0780-1-54-.15 means an action by a Board that has the effect of making the surplus monies for a fund year payable to its members, regardless of whether the amount of surplus is known at the time of the declaration or whether it is intended to be paid at that time.

Authority: T.C.A. §§ 50-6-405(c) and (h).

Paragraph (3) of Rule 0780-01-54-.04 Application for Certificate of Authority is amended by adding the following as subparagraph (e) and renumbering the subsequent subparagraphs accordingly:

- (e) The pool has deposited with the Commissioner, in a form approved by the Commissioner, one of the following types of security in the amount of one hundred thousand dollars (\$100,000) to be used for the payment of claims in the event the pool becomes insolvent:
 - 1. Negotiable securities;
 - 2. Certificates of deposit;
 - 3. Letters of credit; or
 - 4. Surety bonds.

Authority: T.C.A. §§ 50-6-405(c) and (h).

Rule 0780-01-54-.08 Members of the Pool is amended by deleting paragraph (1) and replacing it with the following:

- (1) The board of trustees shall establish underwriting guidelines with respect to the addition of members to the pool as well as the renewal of its members. At a minimum, such underwriting guidelines shall set forth requirements for the members to be able to provide the pool evidence that the member is solvent. Each pool shall file such guidelines and any amendments thereto with the Commissioner no later than thirty (30) days prior to their proposed effective date.

Authority: T.C.A. §§ 50-6-405(c) and (h), and 50-6-115.

Paragraph (4) of Rule 0780-01-54-.08 Members of the Pool is amended by deleting the words "application and" from the last sentence, so that, as amended, the paragraph shall read:

- (4) Membership and coverage of a pool member may take effect no earlier than each member's date of approval by the board of trustees. A board of trustees may allow the pool's administrator to bind coverage on a member that qualifies under the pool's current and approved underwriting guidelines so long as that member's approval is subsequently voted on by the board of trustees at its next meeting. The pool shall notify the Commissioner within ten (10) days of granting

membership to a new member, and shall file a copy of the new member's indemnity agreement.

Authority: T.C.A. §§ 50-6-405(c) and (h), and 50-6-115.

Paragraph (2) of Rule 0780-01-54-.09 Financial Statements and Other Reports is amended by adding the following as new subparagraph (a) and renumbering the subsequent subparagraph accordingly.

- (2) (a) The pool must submit an unaudited management report indicating the current financial condition of each fund year.

Authority: T.C.A. §§ 50-6-405(c) and (h)

Rule 0780-01-54-.09 Financial Statements and Other Reports is also amended by deleting paragraph (3) and replacing it with new paragraphs (3), (4), (5), and (6) and by renumbering old paragraph (4) as paragraph (7) so that as amended, paragraphs (3) through (7) of the Rule shall read as follows:

- (3) In determining the financial condition of the pool, the Commissioner may, in the Commissioner's sole discretion, non-admit the following assets of the pool for any regulatory purpose:
 - (a) Account receivables over ninety (90) days;
 - (b) Pre-paid expenses;
 - (c) Office furniture, computer systems with a value less than fifty thousand dollars (\$50,000), and vehicles;
 - (d) Intangible assets;
 - (e) Loans on personal security and cash advances;
 - (f) Discounting reserves; and
 - (g) Unearned premiums.
- (4) The commissioner may hold a hearing in accordance with the procedures set out in T.C.A. Title 4, Chapter 5, Part 3, to determine whether a certified accountant is qualified and, considering the evidence presented, may rule that the accountant is not qualified for purposes of expressing his or her opinion on the financial statements in the annual audited financial statement made pursuant to this Chapter and require the insurer to replace the accountant with another that the commissioner deems appropriate.
- (5) The financial statements required by this Rule may be prepared in accordance with Generally Accepted Accounting Principles in effect for the period covered by the statement or such other accounting method(s) approved by the Commissioner.
- (6) The Commissioner may prescribe the format and frequency of other reports which may include, but shall not be limited to, payroll audit reports, summary loss reports, and quarterly financial statements. Quarterly loss ratios shall be reported on an accident year basis within thirty (30) days from the end of the quarter.

- (7) Failure to file any of the financial statements required by this Rule on a timely basis authorizes the Commissioner to suspend or revoke the certificate of authority of a pool under Rule 0780-01-54-.22. In lieu of suspending or revoking the pool's certificate of authority, the Commissioner may assess a civil penalty in the amount of one hundred dollars (\$100) per day for each day of delinquency, or in such other amount as allowed by statute.

Authority: T.C.A. §§ 4-5-101 *et seq.*, 50-6-405(c) and (h), and 56-4-101.

Rule 0780-01-54-.11 Premiums and Reserves is amended by adding the following as new paragraphs (1) and (3) and renumbering the subsequent paragraphs, so that, the Rule as amended shall read as follows:

- (1) A pool shall establish and maintain an aggregate surplus equal to:
 - (a) thirty percent (30%) of the unpaid claims liability of the pool. The pool may accumulate the surplus at a rate of ten percent (10%) per fund year over the next three (3) years. However, each pool shall have an aggregate surplus of thirty percent (30%) of the unpaid claims liability three (3) years from the effective date of this Chapter.
- (2) Each pool shall establish through a qualified actuary a premium payment plan for its members and shall submit such to the Commissioner for his/her approval at least thirty (30) days prior to the beginning of the next fund year. The premium payment plan shall not include installment fees. The Commissioner may, in his/her discretion, disapprove a premium payment plan and require the pool to resubmit a premium payment plan for its members that is acceptable to the Commissioner.
- (3) The commissioner may hold a hearing in accordance with the procedures set out in Tenn. Code. Ann. Title 4, Chapter 5, Part 3, to determine whether an actuary is qualified and, considering the evidence presented, may rule that the actuary is not qualified for purposes of expressing his or her opinion on the financial statements in the annual audited financial statement made pursuant to this Chapter and require the insurer to replace the actuary with another that the commissioner deems appropriate.
- (4) Each pool shall establish and maintain adequate reserves for:
 - (a) Known claims and expenses associated therewith;
 - (b) Claims incurred but not reported and expenses associated therewith;
and
 - (c) Bad or uncollectible debt reserves based on the historical experience of the pool or other pools, if no historical experience is available for the pool.
- (5) In addition to the minimum requirements for reserves as set out in this Chapter, the Commissioner may require, after notice and opportunity for hearing, additional reserves so that a pool's reserves shall be reasonable in relation to the pool's outstanding liabilities and premiums and adequate to its financial needs. For purposes of this Rule, in determining whether a pool's reserves are reasonable in relation to the pool's outstanding liabilities and premiums and

adequate to its financial needs, the following factors, among others, shall be considered:

- (a) The size of the pool as measured by its assets, liabilities, reserves, premiums, and other appropriate criteria;
- (b) The number and size of members in the pool;
- (c) The nature and extent of the pool's excess coverage;
- (d) The quality, diversification and liquidity of the pool's investment portfolio; and
- (e) The recent past and projected future trend in the size of the pool's investment portfolio.

Authority: T.C.A. §§ 4-5-101 *et seq.*, 50-6-405(c) and (h).

Rule 0780-01-54-.15 Refunds and Dividends is amended by deleting paragraph (1) in its entirety and replacing it with the following:

- (1) Any monies for a fund year in excess of the amount necessary to fund all obligations for that fund year may be declared to be refundable by the board of trustees not less than eighteen (18) months after the end of the fund year and only with the written approval of the Commissioner.
 - (a) Any request for approval under this Paragraph shall be accompanied by an unaudited management report indicating the financial condition of each fund year.
 - (b) In addition to the information sought in Subparagraph (a) of this Paragraph, the Commissioner may request such additional information from the pool to help in determining whether the declaration of the dividend would be hazardous to the financial condition of the pool.

Authority: T.C.A. §§ 50-6-405(c) and (h).

Rule 0780-01-54-.16 Sponsoring Associations is repealed in its entirety.

Authority: T.C.A. §§ 50-6-405(c) and (h) and 2008 Public Acts, Chapter 841.

Rule 0780-01-54-.20 Examinations and Investigations is amended by deleting paragraph (1) in its entirety and replacing it with the following:

- (1) The Commissioner has the authority to examine the affairs of any pool that has applied for or received a certificate of authority under this Chapter in order to determine the financial condition of the pool or to determine whether the pool is in compliance with all insurance laws and regulations applicable to it. Such examinations shall be conducted when deemed necessary but no less than once every five (5) years, and all expenses of such examinations shall be assessed against the pool, including the costs of contract examiners or specialists. T. C.A. § 56-1-411 provides the standard for examination reports and procedure. The following procedure will be applied to pools:

- (a) No later than sixty (60) days following completion of the examination, the examiner in charge shall file with the Department a verified written report of examination under oath. Upon receipt of the verified report, the Department shall transmit the report to the pool examined, together with a notice which shall afford the pool examined a reasonable opportunity of not more than sixty (60) days to make a written submission or rebuttal with respect to any matters contained in the examination report.
- (b) Within thirty (30) days of the end of the period allowed for the receipt of written submission or rebuttals, the Commissioner shall fully consider and review the report, together with any written submissions or rebuttals and any relevant portions of the examiner's work papers and enter an order:
 - 1. Adopting the examination report as filed or with modifications or corrections. If the examination report reveals that a pool is operating in violation of any law, regulation, or prior order of the Commissioner, the Commissioner may order the pool to take any action the Commissioner considers necessary and appropriate to cure such violations;
 - 2. Rejecting the examination report with directions to the examiners to reopen the examination for purposes of obtaining additional data, documentation or information, and re-filing; or
 - 3. Calling for an investigatory hearing with no less than twenty (20) days notice to the pool for purposes of obtaining additional documentation, data, information or testimony.
- (c) If the examination reveals that the pool is operating in violation of any law, regulation or prior order, the Commissioner in such written order may require the pool to take any action the Commissioner considers necessary or appropriate in accordance with the report of examination or the hearing, if any, on such. That order shall be subject to judicial review in accordance with the provisions of Title 27, Chapter 9.
- (d) All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the Commissioner or his/her designee in the course of an examination made under this Rule must be given confidential treatment and may not be made public by the Commissioner or his/her designee, except as to those uses provided in T.C.A. §§ 56-1-411 and 50-6-405(c).

Authority: T.C.A. §§ 50-6-405(c) and (h), 56-1-204, 56-1-408, 56-1-409(b)(5), 56-1-411 and 56-1-413.

Rule 0780-01-54-.22 Suspension or Revocation of Certificate of Authority is amended by deleting paragraph (2) in its entirety and replacing it with the following:

- (2) As provided by T.C.A. § 56-2-305, with respect to any pool licensed or required to be licensed under this Chapter, and in addition to or in lieu of any action taken in Rule 0780-1-54-.21 or Paragraph (1) of this Rule, the Commissioner may assess a civil penalty against such pool in an amount of not more than one thousand dollars (\$1,000) for each violation, but not to exceed an aggregate penalty of one hundred thousand dollars (\$100,000), unless the pool knowingly violates a statute, rule or order, in which case the penalty shall not be more than

twenty-five thousand dollars (\$25,000) for each violation, not to exceed an aggregate penalty of two hundred fifty thousand dollars (\$250,000). Each day of continued violation constitutes a separate violation for purposes of computing such penalty. This paragraph does not apply where a statute specifically provides for other civil penalties for the violation.

Authority: T.C.A. § 50-6-405(c) and (h) and 56-2-305.

Rule 0780-01-54-.24 Assessments is amended by deleting paragraph (1) in its entirety and replacing it with the following:

- (1) (a) If the aggregate assets of the pool are at any time insufficient to enable the pool to discharge its legal liabilities and other obligations and to maintain the reserves required of it under this Chapter, the pool shall, within thirty (30) days of receiving notice of such deficiency, levy an assessment upon its members for the amount needed to eliminate the deficiency.
- (b) Any deficiency expected for any fund year shall be reported, accompanied by supporting financial documentation, to the Commissioner within three (3) days of the pool receiving notice of the deficiency. The pool shall subsequently submit a plan to the Commissioner for the correcting of the fund year deficiency within thirty (30) days. The plan shall propose for the deficiency to be corrected in one of the following ways:
 - 1. Surplus funds obtained by the pool from a fund year prior to the deficient year with the prior written approval of the Commissioner;
 - 2. Surplus funds obtained by the pool from a fund year subsequent to the deficient year with the prior written approval of the commissioner. However, a pool should satisfy the deficiency under Subparagraph (b)1. of this Paragraph where practical before using the funds of a subsequent fund year;
 - 3. Administrative funds;
 - 4. Assessment of the membership, if ordered by the pool; or
 - 5. Such alternative method as the Commissioner may approve or direct.

Authority: T.C.A. §§ 50-6-405(c) and (h) and 56-9-101, *et seq.*

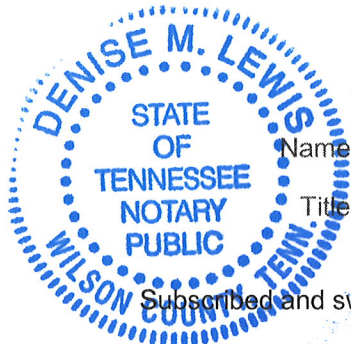
I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Department of Commerce and Insurance on 12/15/08, and is in compliance with the provisions of TCA 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: (02/29/08)

Notice published in the Tennessee Administrative Register on: (03/14/08)

Rulemaking Hearing(s) Conducted on: (add more dates). (04/24/08)



Date: 12/15/08

Signature: Leslie A. Newman

Name of Officer: Leslie A. Newman

Title of Officer: Commissioner

Subscribed and sworn to before me on: 12/15/08

My Commission Expires MAR Notary Public Signature: Denise M. Lewis

My commission expires on: 3/5/12

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Robert E. Cooper, Jr.
Attorney General

12-23-08

Date

Department of State Use Only

Filed with the Department of State on: 12/31/08

Effective on: 3/16/09

Riley C. Darnell

Riley C. Darnell
Secretary of State

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Addendum

Regulatory Flexibility Act Analysis of Impact on Small Businesses

The Department of Commerce and Insurance has considered whether the proposed amendments in this notice of rule making hearing are such that they will have an economic impact on small businesses (businesses with fifty (50) or fewer employees). The proposed amendments are not anticipated to have a significant economic impact affecting small businesses. Specifically, the proposed amendments intend to accomplish several goals by clarifying the definition of "declaration" or "declared" for purpose of declaring dividends. The amendments require a security deposit in the amount of one hundred thousand dollars (\$100,000) to be used for the payment of claims in the event the pool becomes insolvent. Further, the amendments will require the pools to submit additional financial information. The amendments also revise the examination procedures to be consistent with insurance companies. The purposes of the amendments are to ensure that the pools are financially solvent to pay workers' compensation claims.

The outcome of the analysis set forth in Tenn. Code Ann. § 4-5-403 is as follows:

- (1) The proposed amendments apply to those wishing to become members of a workers' compensation self-insurance pool. The adverse impact borne by small employers will be borne by all entities or persons wishing to join a workers' compensation pool. It is not anticipated, however, that these rules will have a significant adverse impact on these employers.
- (2) The administrative costs are thought to be minimal to implement.
- (3) Licensees will have to establish and follow responsible procedures to comply with the mandates of the proposed amendments. The additional requirement will not have a adverse effect on those licensees. Small businesses will not be placed at a disadvantage by having to comply with these rules.
- (4) The amendments are the least burdensome means of meeting the objectives of the General Assembly.
- (5) A search has been conducted to determine which states have taken the described actions notated in the proposed amendment. A number of states have issued bulletins, or adopted similar regulations or legislation, including: Georgia; Florida; Mississippi; North Carolina; Ohio; and Texas.
- (6) Small businesses cannot be exempted due to the nature and importance of these regulations. The purpose of these amendments is to ensure that workers' compensation pools are properly organized and administered to ensure the solvency of the pool. The Department must require strict adherence to these rules to ensure that the pool has enough funds to pay the workers' compensation claims as they arise.

On April 24, 2008, a rulemaking hearing was held by Dakasha K. Winton, Chief Counsel, by designation of Leslie A. Newman, Commissioner, at the offices of the Department of Commerce and Insurance. This hearing, conducted pursuant to the requirements of the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-101 *et. seq.*, allowed the Commissioner of Commerce and Insurance and her designees to hear public comments and responses to the proposed amendments. The amendments are being promulgated pursuant to Tenn. Code Ann. § 50-6-405.

The Commissioner solicited comments from the public by causing notice of the hearing to be published in accordance with the requirements of Tenn. Code Ann. § 4-5-203. The Commissioner received written comments prior to, during and after the rulemaking hearing.

Comment 1
0780-01-54-.02

It was suggested that the proposed amendment should clarify that the definition for "declaration" or "declared" means a *formal* action by the Board. In addition, it was commented that it was the understanding of the self-insurance group representatives that the Department would add the word *formal* to the definition of declared or declaration.

Agency Response to Comment 1

The Department does not agree with this comment. The definition, as currently drafted, coupled with Rule 0780-1-54-.15 prohibits a Board of a pool to take any action which has the effect of making the surplus monies for a fund year payable to its members prior to eighteen (18) months after the fund year. The Department does not agree that inserting the word "formal" in this definition provides any more clarity to the Rule.

Comment 2
0780-01-54-.09

It was commented that the Department should remove any requirement to submit financial statements in accordance with statutory accounting principles.

Agency Response to Comment 2

The Department does not believe the proposed amendment requires workers' compensation pools to submit financial statements in accordance with statutory accounting principles. However, the Department has added a statement to the proposed amendments to further clarify that pools will not be expected to use statutory accounting principles when submitting their financial statements.

Comment 3
0780-01-54-.10(8)

It was commented that the requirement for the pools to report their losses, loss adjustment expenses, premium and payroll to the Commissioner's designated rate service organization in accordance with the designated rate service organization's rules and procedures would be unduly burdensome and costly.

Agency Response to Comment 3

The Department agrees with this comment and has modified the rules accordingly.

Comment 4
0780-01-54-.20

It was commented that the proposed amendment delineate a process for the preparation and adoption of examination reports that require an appeal pursuant to Tenn. Code Ann., tit. 27, ch.9. It was suggested that the appeal process should be pursuant to the Uniform Administrative Procedures Act.

Agency Response to Comment 4

The Department does not agree with this comment. The examination process applicable to pools is set forth in Tenn. Code Ann. §§ 56-1-409(b)(5) and 56-1-411. The law requires that the process for adoption of examination reports for pools should be that as currently used for insurance companies.

Comment 5 0780-01-54-.22

It was commented that the civil penalties appear to be excessive in relation to the small size of the pools. It was suggested that the civil penalty should be limited to one hundred dollars (\$100) per day not to exceed an aggregate penalty of ten thousand dollars (\$10,000), unless the pool knowingly violates a statute or rule, in which case the penalty shall be no more than two hundred and fifty dollars (\$250) per day for each violation, not to exceed an aggregate penalty of twenty-five thousand dollars (\$25,000); each day of continued noncompliance constitutes a separate violation.

Agency Response to Comment 5

The Department has amended this Rule so that the penalties provided are identical to that of other insurance related licensees in Tenn. Code Ann. § 56-2-305.

Comment 6 0780-01-54-.24

It was commented that the proposed amendment requires a fund year deficiency to be made up within thirty (30) days. It was suggested that the amendment be clarified to allow sixty (60) or ninety (90) days to cure the deficiency.

Agency Response to Comment 6

The Department agrees with this comment and the Rule has been changed to permit the pool to submit a plan to the Commissioner within thirty (30) days after the pool reports the fund year deficiency to the Commissioner. The Rule requires the pool to report the deficiency and submit a plan to cure the deficiency within thirty-three (33) days of receiving notice of any fund year deficiency.

Comment 7 0780-01-54-.24

It was commented that the amendments do not clearly define when a deficit occurs in a fund year and what the appropriate action in such case is. It was suggested that the language be modified to require action only when a trust had an overall deficit evaluated on a GAAP basis, or when it is absolutely clear, after the passage of a reasonable amount of time, that a particular fund year was in deficit evaluated on a GAAP basis.

Agency Response to Comment 7

The Department does not agree with this comment. A pool will typically learn of a deficiency through the preparation of its financial statements. If the financial statements that were prepared show that a particular fund year does not have sufficient funds to pay the liabilities for that year, the pool has the responsibility to notify the Department within three (3) days. It may be that the pool's position is that no action is necessary in order to cure the deficiency, but it remains the duty of the pool to notify the Department and have a plan approved with the Department within thirty-three (33) days. The Rule has been changed in order to clarify these options for the pool.

Comment 8
0780-01-54-.24

It was commented that the amendments do not clearly define who must have knowledge of the deficit before the time period to cure the deficiency begins. It was suggested that the time period should not begin until the Board becomes aware of the deficiency.

Agency Response to Comment 8

The Department does not agree with this comment. A pool will typically learn of a deficiency through the preparation of its financial statements. Once the pool receives the financials, it then has a duty to notify the Department within three (3) days. The Department does not agree that a pool board should learn of the deficiency before any requirement exists to inform the Department.

Comment 9
0780-01-54-.24

It was commented that the language should be added to the proposed amendment to clarify at what point a pool would be considered to have become aware of the deficiency.

Agency Response to Comment 9

The Department does not believe such additional language is necessary. A pool will typically learn of a deficiency through the preparation of its financial statements. Once the pool receives the financials, it then has a duty to notify the Department within three (3) days. However, if a pool learns of a deficient year through some other means, it remains under a duty to notify the Department in those instances as well.