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## INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

July 1, 2009

Honorable Sandi Vito, Secretary  
Department of Labor and Industry  
1700 Labor and Industry Building  
Harrisburg, PA 17120

Re: Regulation #12-85 (IRRC #2758)  
Department of Labor and Industry  
Workers' Compensation; Individual Self-Insurance

Dear Secretary Vito:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman  
Executive Director

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Enclosure

cc: Honorable John R. Gordner, Chair, Senate Labor and Industry Committee  
Honorable Christine M. Tartaglione, Chair, Senate Labor and Industry Committee  
Honorable Robert E. Belfanti, Jr., Chair, House Labor Relations Committee  
Honorable Gene DiGirolamo, Chair, House Labor Relations Committee

# Comments of the Independent Regulatory Review Commission



## Department of Labor and Industry Regulation #12-85 (IRRC #2758)

### Workers' Compensation; Individual Self-Insurance

July 1, 2009

We submit for your consideration the following comments on the proposed rulemaking published in the May 2, 2009 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Labor and Industry (Department) to respond to all comments received from us or any other source.

#### **1. Section 125.2. Definitions. - Reasonableness; Clarity.**

##### *Catastrophic loss estimation*

There is no explanation for this definition in the Preamble. The Department should provide a description of the basis for and development of this definition with the final-form regulation. The word “usually” used in Paragraph (i) is vague and provides no clear standard for the regulated community. We recommend that the Department delete this term or include language that clarifies how “usually” is to be determined.

##### *Default multiplier*

We have two concerns with this definition. First, the definition states the default multiplier will be published annually in the *Pennsylvania Bulletin* but does not specify when during the year it will be published. The final-form regulation should specify when the publication will occur.

Second, the definition includes the phrases “based upon the Bureau’s analysis” and “as derived from the experience of the Self-Insurance Guaranty Fund and of sureties and others paying the claims of defaulted self-insurers.” These phrases appear to retain broad discretion for the Department. Please explain the process that the Department will use in its analysis.



### *Special retention amount*

The second sentence of this definition includes the word “may.” The Department needs to explain when it will use the discretion provided by this word and under what circumstances.

### *Standard retention amount*

We have two concerns. First, the definition uses two non-regulatory terms: “generally” and “commonly.” Both are imprecise and should be deleted from or clarified in the final-form regulation. Second, similar to our first concern on the definition of “default multiplier,” the definition fails to specify when information will be published in the *Pennsylvania Bulletin*.

## **2. Section 125.3. Application. - Fiscal impact; Reasonableness; Implementation procedure; Clarity.**

### *Subsection (b)*

The second sentence in this subsection moves the renewal application deadline from two months to three months before the expiration of the current permit. Two commentators express concern and question the need for this change. They are both public employers and claim that this new requirement will impose a burden on them. The Department should explain the justification for this change or retain the existing language in the final-form regulation.

### *Subsection (c)*

Subsections (c)(2) and (3) require an applicant to file Securities and Exchange Commission (SEC) Form 10-K or 10-Q with the Department. A commentator notes that some foreign corporations file Form 20-F or different forms with the SEC or the governing body of an internationally recognized public securities exchange. How will foreign corporations that do not file Form 10-K or 10-Q comply with this requirement?

Financial statements required under Subsection (c)(4) would have to be in accordance with standards established by the American Institute of Certified Public Accountants. We have two concerns. First, how could foreign corporations that use the standards of the International Accounting Standards Board be able to comply with this provision? Second, financial statements referenced in Subsection (c)(3)(i) list accounting standards of three separate Boards. Why is there a difference in these subsections?

The Department proposes the adoption of an electronic format for submitting information about claims in Subsection (c)(8). There are two concerns. First, Subsection (c)(8)(ii) requires an applicant to provide information on all claims that have been closed. A commentator has noted that this could be

burdensome. What is the need for this requirement? We suggest that the requirement be amended to a finite time period. We have a similar concern with Section 125.16(b).

Second, Subsection (c)(8)(iii) contains the phrase “instructions prescribed by the Bureau.” The final-form regulation should specify where and how applicants may access the instructions and electronic format.

*Subsection (d)*

Subsection (d) contains the phrase “within the time period prescribed in writing by the Bureau.” What parameters will the Bureau use in setting this time period. Is there a minimum? The final-form regulation should establish a reasonable minimum period and the Bureau could allow additional time as necessary given the unique conditions of each employer.

**3. Section 125.4. Application for affiliates and subsidiaries. - Reasonableness; Clarity.**

*Subsection (a)*

Existing Subsection (a) discusses affiliates and subsidiaries without including the terms “direct or indirect.” Proposed Subsection (e) refers to a “direct or indirect subsidiary.” A commentator suggests that the terminology in these subsections should be consistent. The Department should address this inconsistency in terminology in this section and throughout the entire regulation.

*Subsection (d)*

Subsection (d) includes new language with the phrase “within a time period prescribed by the Bureau.” Our concern with this phrase was explained above in our comments on Section 125.3(d). The applicant should be notified in writing of the length of the time period, and the Department should consider setting a standard minimum for the time period. This concern is also applicable to the use of a similar phrase in Section 125.7(c).

**4. Section 125.5. Preliminary requirements. - Reasonableness; Clarity.**

New language in Subsection (c) requires that “each employer requesting self-insurance shall have an adequate accident and illness prevention program.” The final-form regulation should specify what constitutes an “adequate” program.



**5. Section 125.6. Decision on application. - Need; Reasonableness; Implementation procedures; Clarity.**

Several of the subsections within this section require the applicant or the Bureau to take certain actions, but the timeframes for completing the actions are not provided. We recommend that the final-form regulation include specific timeframes for when the actions must be complete. The provisions include Subsections (c), (d), (f), (g) and (g)(5).

*Subsection (a)*

Under Subsection (a)2)(ii)(B), how will the Bureau make the referenced estimate? The criteria to be used in making this estimation should be included in the regulation.

*Subsection (c)*

A commentator has stated that the reduction of time from 60 days to 45 days under Subsection (c)(1) and (c)(1)(i) is not sufficient. What is the reason for reducing the time for conditional approvals?

*Subsection (e)*

Subsection (e)(1) states that the Bureau will “establish a deadline, not to exceed 30 days from the Bureau’s date of receipt of the notification, for the submission of the additional materials.” We have two questions. First, why isn’t a specific deadline included in the regulation? Second, how will the applicant be notified of the deadline for submission of the additional material? We recommend that that final-form regulation be amended to include a more precise time period for submitting the additional material that would apply to all applicants. If a specific timeframe is included in the regulation, our second question would be addressed.

*Subsection (g)*

Subsection (g) contains provisions for the appeal process. Subsection (g)(4) includes new language which ends with the following sentence: “The applicant has the burden to prove that the Bureau abused its discretion or acted arbitrarily in the reconsideration decision.” The basis for this placement of the burden of proof is unclear. This new language was not discussed in the Preamble. The Department needs to explain the foundation or it should consider deleting this sentence.

**6. Section 125.9. Security requirements. - Reasonableness; Implementation procedures; Clarity.**

*Subsection (e)*

Subsection (e) states that the Bureau “may” consider reports submitted by the self-insurer and that the Bureau “is not required to accept or use” the reports when making decisions. This language does not establish a binding norm that could be equally applied to all self-insurers. What criteria will the Bureau use when deciding to accept or use a report? Will the self-insurer be notified of the Bureau’s decision to use or not use the information provided? We recommend that this provision either be deleted or written in a manner that specifies the criteria the Department will apply in determining whether to accept or use a report.

*Subsections (f) and (g)*

Similar to our concern with Subsection (e), we believe that Subsections (f) and (g) provide a great deal of discretion to the Bureau and not enough certainty to the regulated community. While we understand the need for some flexibility, regulations establish binding norms. Non-regulatory documents, such as Statements of Policy, would be a more appropriate vehicle for the type of flexibility found in Subsections (f) and (g). We recommend that both subsections be amended to provide a greater degree of certainty to the regulated community.

*Subsection (j)*

Under Subsection (j), a commentator has suggested keeping the timeframe for phasing in additional security at three years rather than two years until the impact of the new rules are analyzed. We believe this a sound suggestion and recommend that the Department maintain the three-year period, or explain why two years is necessary.

*Subsection (k)*

The language being deleted addresses reduction and release of security on run-off accounts, but the new language only addresses release. Is it the Department’s intention to no longer grant requests for a reduction of security by a runoff self-insurer?

*Subsection (m)*

This subsection states that the “Bureau may revise the table in subsection (l) through publication of a notice in the *Pennsylvania Bulletin*, to assign security discount rates for revisions to the long-term credit or debt ratings of the outlined NRSROs or for the long-term credit or debt ratings of other NRSROs.”



However, this would constitute amending an existing regulation while bypassing the normal rulemaking process. The Department needs to provide justification for making future amendments to the regulation without going through the formal rulemaking process. (Section 125.2. of the proposed regulation defines “NRSRO” as “a designated Nationally-recognized statistical rating organization of the United States Securities and Exchange Commission or its successor.”)

**7. Section 125.10. Funding by public employers. - Fiscal impact; Implementation procedures; Clarity.**

*Fiscal impact*

A public employer has commented that replacing the trust fund concept with a “dedicated asset account” will be a financial burden to both the employer and taxpayers and that it will not improve the security of future payments to injured workers. What, if any, fiscal impact will this change have on public employers?

*Subsection (a)*

The phrase “dedicated asset account” is used throughout this section, but it is not defined. We suggest that the final-form regulation include a definition for this term, under Section 125.2, pertaining to definitions.

*Subsection (d)*

Subsection (d)(3) states, “For good cause shown” an active self-insurer may be allowed to phase in compliance with the required funding amount “within a time period prescribed by the Bureau.” Similar to our concern with Section 125.9 (e),(f) and (g), this subsection does not establish a binding norm. We suggest that it be amended to provide more specific detail on what is considered “good cause” and how long the phase-in period for compliance will be.

The phrase “or at a later date agreed to by the Bureau” found under Subsection (d)(4) is vague. Under what circumstances would a self-insurer and the Bureau agree to this exception to the 120-day requirement found in this subsection? The final-form regulation should include more detail on how the process of requesting additional time will work and how the Bureau will make its decision on the request.

**8. Section 125.11. Excess insurance. - Implementation procedures; Clarity.**

Regarding Subsection (a), a commentator has stated that it is unable to fully assess the potential impact of the proposed excess insurance amendments on

premium expenses because the language of this subsection is unclear. The language in question states, "...a liability limit acceptable to the Bureau to provide an adequate level of protection to cover the losses from a catastrophic event." We agree that the language is unclear and fails to provide the necessary detail for compliance. The final-form regulation should include more specific language that could be applied uniformly to all members of the regulated community.

**9. Section 125.12. Payment, handling and adjusting of claims. - Implementation procedures; Clarity.**

Under Subsection (c), how much time will a self-insurer have to notify the Bureau when it makes the changes referenced in this subsection? How will the Bureau notify the self-insurer of what the timeframe for submitting requested information is? We recommend that the final-form regulation include language to answer both of these questions.

**10. Section 125.13. Special funds assessments. - Fiscal impact; Need; Reasonableness;**

Concerning Subsection (a)(5), one commentator objected to an additional assessment being placed on self-insurers for the "Uninsured Employers Guaranty Fund." This fund was established by Act 147 of 2006. However, its application to self-insured employers and their employees is unclear. The Department should explain its rationale for this amendment.

**11. Section 125.16. Reporting by runoff self-insurer. - Implementation procedures; Clarity.**

As with a previous provision in Section 125.3(c)(8)(iii), Subsection (b) will require self-insurers to use a new electronic format to file a report. It includes references to "the Bureau's instructions." The final-form regulation should specify where and how self-insurers can access the instructions and the electronic format.

**12. Section 125.17. Claims service companies. - Reasonableness; Implementation procedures.**

This section is being amended to set forth the continuing obligation of claims service companies to assist the self-insurer and the Bureau in providing data and information on the self-insurer's claim serviced by that company. We have two issues. First, if a claims service company is no longer working for or with a self-insurer, how will the Department enforce the provisions of this section? Second, the first sentence in Subsection (d) includes this phrase: "A claims services company...shall provide reasonable assistance to the self-insurer and the Bureau...." The use of the word "reasonable" in this context is unclear.



What criteria will the Department use to determine if the assistance is reasonable”?

**13. Section 125.19. Additional powers of Bureau and orders to show cause. - Implementation procedures; Clarity.**

Under Subsection (b), what does the phrase “unreasonably failing to pay compensation” mean? The final-form regulation should include more specific language on how it will determine if a self-insurer acted in an unreasonable manner as it pertains to payment of compensation.

**14. General - Need; Clarity.**

*Evidence of the coverage*

The phrase “evidence of the coverage” or similar phraseology is used in the following subsections:

- 125.6(c)(1)(iv)
- 125.6(d)
- 125.6(f)(1)(ii)
- 125.6(f)(2)
- 125.9(b)(1)(iii)
- 125.9(b)(2)(iii) – evidence of the standby arrangement
- 125.9(b)(3)(iv) – evidence of the standby arrangement
- 125.9(k)(2) – evidence acceptable to the Bureau
- 125.19(a)(3)

This phrase is unclear and lacks specificity. For each subsection noted above, the Department should specify the type of evidence that would be acceptable.

*Forms*

Several sections refer to the “prescribed form” or “form prescribed by the Bureau.” Samples of these sections include: Sections 125.3(a), 125.3(c)(6), 125.3(c)(7), 125.4(a), 125.8(b)(1) and 125.16(a). The Department needs to provide direction in the final-form regulation for how applicants can access or obtain copies of these forms.

## Facsimile Cover Sheet



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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
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**To:** Neil E. Cashman, Jr.  
**Agency:** Department of Labor & Industry  
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**Date:** July 1, 2009  
**Pages:** 10

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Department of Labor & Industry's regulation #12-85 (IRRC #2758). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by:



Date:

