

Rulemaking Hearing Rules
of the
Department of Commerce and Insurance
Division of Insurance

Chapter 0780-1-81
Administration of Self Insurance Workers' Compensation Programs by Single
Employers or Pool

Public Comments and Responses
By the Commissioner of Commerce and Insurance

Compiled Pursuant to Tenn. Code Ann. § 4-5-222

On December 17, 2004, a rulemaking hearing was held by Larry C. Knight, Jr., Assistant Commissioner for Insurance and John F. Morris, Chief Counsel for Insurance, by designation of Paula A. Flowers, 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. § 4-5-204, *et seq.*, allowed the Commissioner of Commerce and Insurance and her designees to hear public comments and responses to the proposed rule. The rule is being promulgated pursuant to Tenn. Code Ann. § 50-6-405(b) and (c).

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 oral and written comments at the rulemaking hearing.

Comment 1

Rule 0780-1-81.-02(14) Definitions

It was commented that Paragraph (14) of this Rule could be interpreted to classify anyone that collects premiums as a third party administrator. It was further commented that some entities allow their administrator, which is not their third party administrator, to collect premium payments in order to monitor deposits and payments. Thus, it was suggested that this Rule be clarified to provide an exception for licensed administrators that collect premiums which are not third party administrators.

Agency Response to Comment 1

The Department agrees with this comment and will amend the rules accordingly.

Comment 2

Rule 0780-1-81-.02(14) Definitions

It was suggested that an exception to the definition of “third party administrator” be added for individuals employed by a licensed third party administrator.

Agency Response to Comment 2

The Department agrees with this comment and will amend the rules accordingly.

Comment 3

Rule 0780-1-81-.05(2)(5) Maintenance of Information

It was commented that an employer or pool should be given access to any information that the Commissioner obtains from a third party administrator, without creating a waiver of any applicable privilege, or claim of confidentiality, as it relates directly or indirectly to the pool or employer’s business.

Agency Response to Comment 3

Paragraph (1) of this Rule requires the third party administrator to make available to the employer or pool complete books and records of all transactions performed on behalf of the employer or pool. The additional disclosure contemplated by the comment does not appear to be necessary.

Comment 4

Rule 0780-1-81-.06(2) Responsibilities of Employer or Pool

It was suggested that less responsibility be placed on the employer or pool for the conduct of the third party administrator considering that they are now required to obtain a license.

Agency Response to Comment 4

The law places the ultimate responsibility for the administration of workers’ compensation self-insurance programs with the self-insuring employers or pools. These rules are not intended to replace this responsibility in any manner.

Comment 5

Rule 0780-1-81-.07(1) Collections of Monies and Payments of Claims

It was commented that this Rule incorrectly assumes that the third party administrator collects premium payments and not any other type of administrator collects payments. Thus, it was commented that this Rule unduly restricts any other administrator to collect funds without being licensed as a third party administrator.

Agency Response to Comment 5

This Rule is not intended to require that third party administrators collect premiums but only to prescribe the responsibilities for third party administrators that do collect premiums.

Comment 6

Rule 0780-1-81-.07(1) Collection of Monies and Payments of Claims

It was commented that this Rule should be clarified to state that the employer or pool retains decision making authority as to where the funds are to be maintained.

Agency Response to Comment 6

The employer or pool and third party administrator should include who has this authority in their written agreement.

Comment 7

Rule 0780-1-81-.07(1-3) Collection of Monies and Payments of Claims

It was commented that these sections of this Rule appear unnecessary and unduly restrict the ability of self-insured pools and self-insured employers to freely contract with third party administrators to delegate whatever claims administration, loss control, and account management functions they desire to delegate.

Agency Response to Comment 7

The Department disagrees with this comment. The minimal requirements set out in this Rule are designed to provide basic requirements for the handling of monies by the third party administrator.

Comment 8

Rule 0780-1-81-.07(4) Collection of Monies and Payments of Claims

It was commented that the Tennessee Department of Labor and Workforce Development has proposed rules relative to that Department's penalty program for failure to promptly and accurately adjust claims. The commenter stated that those proposed rules could be found in the November 15, 2004 issue of the Tennessee Administrative Register at pages 29-38. The commenter stated that because of Department of Labor and Workforce Development's proposed rules, this Rule is unnecessary and should be removed.

Agency Response to Comment 8

The Department expects all third party administrators to comply with the prompt pay standards set forth in both Title 50 and Title 56 for the payment of workers' compensation benefits. Any rules promulgated under either Title 50 or Title 56 relating to prompt payment of workers' compensation benefits should also be complied with by a third party administrator. Public Chapter 962 Sections 39 and 40 made the failure to pay workers' compensation benefits as required by the Department of Labor and Workforce Development an unfair and deceptive trade practice or act. This evidences the General Assembly's intention that the Department of Labor and Workforce Development and this Department are to have joint regulation over the prompt payment of workers' compensation benefits.

Comment 9

Rule 0780-1-81-.08 Disclosure of Charges and Fees

It was commented that this Rule should provide some clarification as to whom disclosures should be made.

Agency Response to Comment 9

The Department agrees with this comment and will amend the rules accordingly.

Comment 10

Rule 0780-1-81-.08 Disclosure of Charges and Fees

It was suggested that this Rule should be deleted as its scope reaches agreements between affiliates of third party administrators and employer or pools which have no relation to the third party administrator services provided to the employers or pools. Alternative language was suggested.

Agency Response to Comment 10

The Department believes it is important for employers and pools to be aware of any potential conflicts of interest in the way in which third party administrators provides multiple services to employers and pools. This Rule is designed so that employers and pools are provided complete disclosure of the monies paid to their third party administrator's affiliates for services rendered.

Comment 11

Rule 0780-1-81-.09(2)(a) Certificate of Authority

It was commented that a trade name certificate should not be required as part of the application process.

Agency Response to Comment 11

This Rule seeks to require a trade name certificate, if used by a third party administrator, in order to better track the names used by licensed third party administrators.

Comment 12

Rule 0780-1-81-.09(2)(b) Certificate of Authority

It was commented that this Rule is unclear as to what documentation the Department is requesting.

Agency Response to Comment 12

This Rule seeks to obtain any documents which set out how the third party administrator applicant will be managed including, by-laws, rules, regulations or other documents of a similar nature.

Comment 13

Rule 0780-1-81-.09(2)(d) Certificate of Authority

It was commented that the statement which reserves the ability of the Commissioner to only consider assets that would be admitted by the National Association of Insurance Commissioners (NAIC) Accounting Practices and Procedures Manual should be deleted because it would adopt statutory accounting for service companies instead of generally accepted accounting principles.

Agency Response to Comment 13

This Rule does not seek to require third party administrators to have their financial audits done in accordance with the NAIC Accounting Practices and Procedures Manual, but only to give the Department the authority to consider such items as good will and other intangible assets in determining the true financial condition and responsibility of an applicant. The Department strongly believes there is a correlation between a third party administrator's financial condition and its ability to responsibly perform its duties.

Comment 14

0780-1-81-.09(2)(d) Certificate of Authority

It was commented that a different form of accounting, other than an audited financial statement, should suffice for proving that an applicant has a positive net worth. The commenter stated that some small third party administrators may not be able to provide audited financial statements or generally accepted accounting principles financials.

Agency Response to Comment 14

The Department believes that audited financial statements are the most reliable type of financial statements since they are prepared by an independent auditor in accordance with generally accepted accounting principles.

Comment 15

0780-1-81-.09(2)(d)(2) Certificate of Authority

It was commented that this section requires that the amounts for each entities shall be stated separately; however this commenter only releases consolidated financial reports and not individual units or departments.

Agency Response to Comment 15

The Department expects third party administrators to provide a break down by each entity that the third party administrator provides services to in order to assure the Department that the third party administrator is not commingling the funds of separate employers or pools.

Comment 16

0780-1-81-.09(2)(e) Certificate of Authority

It was commented that this section should be deleted as staffing levels are generally dependant on how many clients the third party administrator has at the time and how many employees the clients have. It was also commented that requirement would create unnecessary costs.

Agency Response to Comment 16

The information sought by this Rule is designed to help the Department determine an applicant's ability to fulfill its responsibilities to employers and pools. By requiring this information, the Department can better ensure that a licensed third party administrator has sufficient staffing to competently administer an employer or pool's self-insured program.

Comment 17

0780-1-81-.09(2)(e) Certificate of Authority

It was commented that the Department should clarify whether it wants a statement describing the business plan or a copy of the business plan itself. The commenter stated that if the Department requires the full business plan, this would contain proprietary information not related to the third party administrator function.

Agency Response to Comment 17

The Department will accept an applicant's business plan as compliance with this Rule. Such submissions are kept confidential by the Department pursuant to Rule 0780-1-81-.05(2).

Comment 18

0780-1-81-.09(2)(e) Certificate of Authority

It was commented that it was unclear why the Department wanted a nationwide business plan if the business will be conducted only in Tennessee.

Agency Response to Comment 18

The Department believes its ability to meet its obligations to non-Tennessee persons as relevant to a third party administrator's ability to meet its obligations to Tennessee employers and pools.

Comment 19

0780-1-81-.09(2)(e) Certificate of Authority

It was commented that the Department should clarify what is meant by "sufficient personnel".

Agency Response to Comment 19

A third party administrator should be staffed to a level to adequately meet its obligations to provide services to an employer or pool.

Comment 20

0780-1-81-.09(3) Certificate of Authority

It was commented that this provision should clarify what "all" contracts mean. The commenter stated that there are several contracts that a third party administrator may have, including but not limited to, employee benefits, other types of businesses, leases, and etc., including contracts that are not within the State of Tennessee.

Agency Response to Comment 20

The Department expects an applicant to make available all contracts relating to services being rendered by the third party administrator.

Comment 21

0780-1-81-.09(4) Certificate of Authority

It was commented that the word “produce” in this provision implies an affirmative duty for an applicant to bring up to the Department’s offices all such accounts, records, books, etc. Thus, to avoid confusion, the commenter suggested the word “produce” be replaced with the phrase “make available for inspection.”

Agency Response to Comment 21

The Department will accept this comment and will amend the rules accordingly.

Comment 22

0780-1-81-.09(4) Certificate of Authority

It was commented that this Rule is unclear as to whether the records, accounts, and other documents required by this Rule to be made available to the Commissioner refer to only Tennessee matters or all matters.

Agency Response to Comment 22

This Rule is intended to apply to all the records of a third party administrator. If the third party administrator does business in states other than Tennessee, those accounts, records, and files should be made available for inspection by the Commissioner as well.

Comment 23

0780-1-81-.09(5) Certificate of Authority

It was commented that this provision is too broad in the discretion it grants to the Department in granting a certificate of authority to a third party administrator and, therefore, should be deleted. The commenter stated that, this provision appears inconsistent with proposed rule 0780-1-81-.10, which sets forth specific standards for the denial of a license.

Agency Response to Comment 23

The Department does not believe the two (2) Rules are inconsistent with each other. This Rule provides for an additional ground upon which the Commissioner may deny a new application for licensure. Such ground is relatively common among licensing programs administered by this Department.

Comment 24

0780-1-81-.09(7) Certificate of Authority

It was commented that this provision should be deleted because the notification requirement for “circumstances or facts affecting the qualification for a certificate of authority or license” are unclear and compliance would be extremely difficult.

Agency Response to Comment 24

The Department expects a third party administrator that has received a certificate of authority from this Department to report any events or changes in circumstances that were pertinent to the licensure process. Any event or change in circumstance that would have prevented an applicant from being issued a certificate of authority should be reported immediately to the Department.

Comment 25

0780-1-81-.09(8) Certificate of Authority

It was commented that this Rule appears to conflict with Paragraph (6) of this Rule because it seems to require complete availability of information for renewal also.

Agency Response to Comment 25

The Department agrees with this comment and Paragraph (6) has been amended accordingly to reflect the need for renewal as required in Paragraph (8).

Comment 26

0780-1-81-.09(8) Certificate of Authority

It was commented that it is unclear as to why a third party administrator should be required to renew its certificate of authority when insurance companies are not required to renew their certificate of authority.

Agency Response to Comment 26

The Department believes this Rule to be appropriate and rejects this comment.

Comment 27

0780-1-81-.09(8) Certificate of Authority

It was commented that this section should be deleted because little or no departmental review is contemplated in the Rules to take place at renewal; therefore the five hundred dollars (\$500) fee should not be required.

Agency Response to Comment 27

The renewal fee is meant to help offset the ongoing regulation of third party administrators done by the Department.

Comment 28

0780-1-81-.09(9) Certificate of Authority

It was commented that this Paragraph should be modified to grant currently authorized third party administrators until one (1) year after the proposed rules are effective to become properly authorized.

Agency Response to Comment 28

This Rule provides currently authorized third party administrators until January 1, 2006 to come into compliance with these proposed rules. The Department believes this to be a reasonable period of time and therefore rejects this comment.

Comment 29

0780-1-81-.10(1)(b) Grounds for Denial, Suspension, or Revocation of Certificate of Authority

It was commented that this Rule is meant to apply to insurance companies and the commenter suggested deletion of every sentence except the first sentence of proposed Rule 0780-1-81-.10(1)(b).

Agency Response to Comment 29

While not all of the standards set forth in Rule 0780-1-66 are applicable to the financial and operational condition of a third party administrator, many of the standards are applicable. Should a third party administrator have any questions concerning the applicability of a specific standard it should contact the Department.

Comment 30

0780-1-81-.10(1)(b) Grounds for Denial, Suspension, or Revocation of Certificate of Authority

It was commented that this provision appears to be very broad and does not clarify what constitutes an unsound financial operational condition.

Agency Response to Comment 30

The Department believes that this Rule is appropriate as written. The Rule specifically states that the Commissioner may utilize the criteria contained in Rule 0780-1-.66 which sets forth standards for determining a hazardous financial condition.

Comment 31

0780-1-81-.10(1)(f) Grounds for Denial, Suspension, or Revocation of Certificate of Authority

It was commented that this provision could encourage the trial bar to file frivolous lawsuits impacting insurance such as, the excess carrier and errors and omissions. The commenter stated that requiring a third party administrator to maintain errors and omissions insurance would appear to provide the safeguard the Department seems to wish without creating an unjustified reason to file lawsuits.

Agency Response to Comment 31

Paragraph (6) of this Rule prevents this provision from being used in a private cause of action. The Department believes that errors and omissions coverage is not a valid substitute for lawful operations.

Comment 32

0780-1-81-.10(1)(f) Grounds for Denial, Suspension, or Revocation of Certificate of Authority

It was commented that this provision is silent as to whether the pools would be afforded the protection against a private right of action as afforded to third party administrators by Paragraph (6) of this Rule. Therefore, the commenter requested either clarification or deletion of this provision.

Agency Response to Comment 32

As this standard only applies to third party administrators, the Department does not believe that this provision creates any civil liability for the pools.

Comment 33

Rule 0780-1-81-.10(1)(f)

It was commented that the Department of Labor and Workforce Development is authorized to assess penalties for prompt payment violations and therefore this provision of the proposed rules should be deleted or clarified.

Agency Response to Comment 33

The Department expects all third party administrators to comply with the prompt pay standards set forth in both Tenn. Code Ann. Title 50 and Title 56 for the payment of workers' compensation benefits. Any rules promulgated under either Title 50 or Title 56 relating to prompt payment of workers' compensation benefits should also be complied with by a third party administrator. Public Chapter 962 Sections 39 and 40 made the failure to pay workers' compensation benefits as required by the Department of Labor and Workforce Development an unfair and deceptive trade practice or act. This evidences the General Assembly's intention that the Department of Labor and Workforce Development and this Department are to have joint regulation over the prompt payment of workers' compensation benefits.

Comment 34

0780-1-81-.10(1)(j) Grounds for Denial, Suspension, or Revocation of Certificate of Authority

It was commented that this section should be deleted because little or no departmental review is contemplated in the Rules to take place at renewal. The commenter stated that the failure to pay the annual renewal fee provision which creates a ground for denial, suspension, or revocation of the certificate of authority is unjust.

Agency Response to Comment 34

The Department believes this ground is appropriate and rejects this comment.

Comment 35

0780-1-81-.10(2) Grounds for Denial, Suspension, or Revocation of Certificate of Authority

It was commented that this provision should be deleted because it appears unnecessary and may violate, in application, the Uniform Administrative Procedures Act and raises due process concerns.

Agency Response to Comment 35

The Department in the situation outlined in this Paragraph may need to take emergency action against the license of a third party administrator to prevent further harm to the public. The Uniform Administrative Procedures Act contemplates such necessity in Tenn. Code Ann. § 4-5-320.

Comment 36

0780-1-81-.10(3) Grounds for Denial, Suspension, or Revocation of Certificate of Authority

It was commented that the one thousand dollars (\$1000) per occurrence is a much stiffer penalty than what is imposed upon insurance companies and the commenter suggested the imposition of civil penalty similar to those delineated for insurance companies for unfair and deceptive acts and practices.

Agency Response to Comment 36

The Department believes this Rule to be appropriate and rejects this comment.

Comment 37

0780-1-81-.10(5) Grounds for Denial, Suspension, or Revocation of Certificate of Authority

It was commented that the second sentence in this provision seems to conflict with the Tennessee General Assembly Rules setting forth the manner persons should be served. The commenter stated that the sentence should be deleted or clarified to state that this sentence only applies to administrative actions by the Commissioner with respect to these proposed rules, and not to any other party.

Agency Response to Comment 37

The Rule has been amended accordingly to reflect that the service contemplated by this Rule is only meant to apply to actions taken by this Department.

Comment 38

It was commented that the Department should replace the term “third party administrator” with the term “service company”.

Agency Response to Comment 38

The Department believes the term “third party administrator” to be the standard entity usage for such entities that provide the functions outlined in the definition of “third party administrator”.