

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 rules pursuant to Tenn. Code Ann. § 56-5-314(c). The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-204 and will take place in Room 160 of the Davy Crockett Tower located at 500 James Robertson Parkway in Nashville, Tennessee at 9:00 a.m. CST on the 17th day of December, 2004.

Any individuals with disabilities who wish to participate in these proceedings (to review these filings) should contact the Department of Commerce and Insurance to discuss any auxiliary aids or 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 Department 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, 5th Floor, Nashville, Tennessee 37243 (615) 741-0481.

For a copy of this notice of rulemaking hearing, contact: John F. Morris or Tracey Gentry Harney, Department of Commerce and Insurance, Davy Crockett Tower, Fifth Floor, 500 James Robertson Parkway, Nashville, Tennessee 37243, telephone (615) 741-2199.

Substance of Proposed Rules

Chapter 0780-1-79
Adoption of the Tennessee Assigned Risk Plan

New Rules
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0780-1-79-.01 Authority and Purpose.

Provide reasonable rules pursuant to Tenn. Code Ann. § 56-5-314(c) to establish the Tennessee Workers' Compensation Insurance Plan and govern the equitable distribution of risks by direct assignment, reinsurance, or otherwise, and their assignment to insurers, and provide a method whereby applicants for insurance, insureds, and insurers may have a hearing on grievances and the right of appeal to the Commissioner.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.02 Definitions.

- (1) "Administrator" means the organization selected through a competitive bid process by the Commissioner as the administrator for the Plan.
- (2) "ALDA" means the Adverse Loss Development Account maintained by the Administrator for payment of claims made under the Plan.
- (3) "Allocated Loss Adjustment Expense" or "ALAE" means those expenses directly associated with a particular claim, including those expenses incurred by a servicing carrier, the Administrator, the reinsurance administrator, or the Plan in the investigation, negotiation, and settlement of claims, suits or legal proceedings directly associated with declaratory judgment action on a particular claim, which include, but are not limited to the following: expert witness fees, legal fees that are directly allocable to a workers' compensation claim, legal expenses incurred in the pursuit of subrogation, private investigator fees allocable to a particular claim, expert witness fees in the defense of a claim, costs for birth and death certificates directly allocable to a claim, fees for hospital medical records and copy services directly allocable to a claim, appeal bond costs and filing fees directly allocable to a claim, costs of securing medical or legal documents to determine liability, fees for a medical examination of a claimant to determine the apportionment of liability, causal relationship, maximum medical improvement (by a non-treating physician), and permanent partial disability rating allocable directly to a particular claim, legal and other expenses incurred in the pursuit of collections of unpaid premiums, and arbitration fees in connection with a particular claim.
 - (a) ALAE also includes any interest on any judgment or award, prejudgment interest or delayed damages, except prejudgment interest or delayed damages which are considered to be part of loss: (1) by the terms and conditions of the policy reimbursed, insured, or reinsured hereunder, or (2) by law or regulation of the governmental body having jurisdiction.
- (4) "Client-relations consultant" means an employee of the Administrator that attempts to mediate the dispute resolution process and serves as a liaison to all parties.
- (5) "Collected premium" means premiums for workers' compensation insurance actually received by the servicing carrier(s), the Plan, and/or the Administrator which are determined by the authorized base rates, any experience modification, any applicable schedule rating modification, surcharge programs, loss constants, minimum premiums, and the expense constant, net of any return premiums.
- (6) "Commissioner" means the Commissioner of the Tennessee Department of Commerce and Insurance.
- (7) "Deficit" means the determination by the Administrator that the amount of losses, allocated loss adjustment expenses, servicing carrier fees, administrative fees, taxes, assessments, and all other Plan expenses paid, including, but not limited to premium collection expenses, exceeds the amount of collected premium, including any investment income, for the policies issued during

each plan period, except that all premiums and losses resulting from those employers insured by direct assignment carriers shall be excluded. Deficits shall be reported to the Department on an as incurred basis.

- (8) “Department” means the Department of Commerce and Insurance for the State of Tennessee.
- (9) “Designated rate service organization” means the entity designated by the Commissioner pursuant to Tenn. Code Ann. § 56-5-320.
- (10) “Direct assignment carrier” means an insurer licensed to write workers’ compensation insurance in Tennessee that has chosen the option under this Chapter and has been approved by the Commissioner to accept its pro rata share of risks directly, rather than participating in the Plan or Reinsurance Mechanism. Direct assignment carriers do not participate in a deficit assessment or surplus distribution, however, they must accept their pro rata share of the plan administration expenses and reimburse the Tennessee Workers’ Compensation Insurance Assigned Risk Plan accordingly.
- (11) “Employer” means any going financial concern, person or business entity, whether for-profit or not-for-profit, that elects to or is required by law to purchase workers’ compensation insurance to cover its statutory obligation to its employees. Entities that are affiliated or have common ownership are considered to be a single employer for purposes of this Chapter.
- (12) “Insurance producer” shall have the same meaning as defined in Tenn. Code Ann. § 56-6-102.
- (13) “Investment income” means money earned from invested assets. Investment income may also include realized capital gains, or be reduced by capital losses, over the same period.
- (14) “Loss or losses” means payments that the servicing carriers(s) are required to pay out under the terms and conditions of the policies issued by the servicing carrier(s) to eligible insured on behalf of the Plan. Loss or losses shall also include an event where a servicing carrier or the Administrator is made or threatened to be made a party to any action, suit or proceeding, because either was a servicing carrier and/or the Administrator pursuant to and acting in accordance with these rules, said servicing carrier and/or Administrator shall be indemnified by the Plan against all judgments, fines, amounts paid in settlement, reasonable costs and expenses, including attorneys’ fees, and any other liabilities that may be incurred as a result of such action, suit or proceeding, or threatened action, suit or proceeding, except in relation to matters as to which the servicing carrier and/or the Administrator shall be adjudged in such action, suit or proceeding to be liable by reason of willful misconduct or gross negligence in the performance of its duties or obligations as a servicing carrier or Administrator for the Plan. Such indemnification shall not be exclusive of other rights the Administrator and/or servicing carrier may have, and shall pass to the successors, heirs, executors or administrators of the servicing carrier and/or Administrator. The termination of any such civil or criminal action, suit or proceeding by judgment, settlement, conviction or upon a plea of *nolo contendere*, or its equivalent, shall not in itself create a presumption that any such person or insurer was liable by reason of willful misconduct or gross negligence.
- (15) “Non-public personal information” has the same meaning as set forth in Rule 0780-1-72-.04(22).
- (16) “Participating insurance carrier” means any insurance carrier, other than those designated by the Commissioner as a direct assignment carrier, licensed to transact workers’ compensation insurance business in the State of Tennessee, and who shall also serve as a reinsurer under the Reinsurance Mechanism.
- (17) “Plan” means the Tennessee Workers’ Compensation Insurance Assigned Risk Plan, which is the residual market plan in effect in the state of Tennessee created by the Commissioner pursuant to Tenn. Code Ann. § 56-5-314.

- (18) “Plan period” means each one (1) year policy period of the Plan and the mechanism, beginning with the effective date of the Plan and the Reinsurance Mechanism which shall include all policies issued on behalf of the Plan that incept during each one (1) year policy period as indicated above. In the event that the Tennessee Workers’ Compensation Insurance Assigned Risk Plan and/or the Reinsurance Mechanism are terminated prior to the anniversary of any plan period, then such final plan period shall be for a period of less than one year ending on such date of termination.
- (19) “Policy year” means the amount of time duration between the inception of the first policy written in a one (1) year plan period and the expiration of the last policy written in the same one (1) year plan period.
- (20) “Reinsurance administration expense(s)” means the reasonable expenses and associated fees required for the administration of the Reinsurance Mechanism by the reinsurance administrator. The expenses for administering any assessment under the mechanism shall be reasonable in comparison to the amount of excess reinsurance losses assessed and are subject to review by the Commissioner as to such reasonableness, such expenses are considered to be pool administration expenses.
- (21) “Reinsurance Mechanism” means the Tennessee Aggregate Excess of Loss Reinsurance Mechanism, as outlined in Rule 0780-1-79-.15.
- (22) “Reinsurer(s)” shall have the same meaning as participating insurance carrier(s), as defined herein.
- (23) “Servicing carrier” means a licensed insurer that has been selected by the Administrator and the Department through a competitive bid process to provide workers’ compensation insurance to employers that are in good faith entitled to such insurance, on an assigned basis.
- (24) “Servicing carrier agreement” means the formal written agreement between the Administrator, acting on behalf of the Plan, and each individual servicing carrier regarding the duties and obligations of each party as they relate to each other under the plan document.
- (25) “Servicing carrier fee(s)” means those fees, based as a percentage of collected premium, that are paid to insurance carriers that have been selected as servicing carriers for the Plan.
- (26) “Surplus” means whenever the amount of losses incurred, allocated loss adjustment expense, servicing carrier fees, taxes, assessments, incurred but not reported claims, administrative fees and all other Plan expenses, including, but not limited to premium collection expenses paid, are less than the amount of collected premium (plus investment income on collected premiums), for the policies issued during each plan period. This calculation shall combine the results of all servicing carriers contracting with the assigned risk plan, and shall exclude any premiums or losses incurred by direct assignment carriers.
- (27) “UAPA” means the Uniform Administrative Procedures Act, as amended, at Tenn. Code Ann. §§ 4-5-101, *et seq.*
- (28) “Voluntary workers’ compensation premium” means the direct written premiums for workers’ compensation insurance on accounts that an insurance company writes in the voluntary or regular market in the State of Tennessee.
- (29) “Workers’ compensation insurance” means insurance including employer’s liability insurance, that provides coverage for an employer’s obligations as enumerated in the state Workers Compensation Law, including, but not limited to, the U.S. Longshore and Harbor Workers’ Compensation Act (as amended), the Jones Act (as amended), and the Federal Coal Mine Health

and Safety Act of 1969 (as amended); any other such coverage as determined by law or judicial ruling; and any other such coverages and/or endorsements as determined by the Administrator and approved by the Commissioner, including, but not limited to the following, if requested by the insured employer or their designated insurance producer:

- (a) Employers liability increased limits up to a maximum limit of:
 - 1. Bodily Injury by Accident -- \$1,000,000 - each accident.
 - 2. Bodily Injury by Disease -- \$1,000,000 - policy limit.
 - 3. Bodily Injury by Disease -- \$1,000,000 - each employee.
- (b) Coverage under the following Acts shall be applicable, provided that United States Longshore and Harbor Workers Compensation Act coverage is present on the policy:
 - 1. Outer Continental Shelf Lands Act;
 - 2. Defense Base Act;
 - 3. Nonappropriated Fund Instrumentalities Act
- (c) Coverage for Maritime (Admiralty), Program I or Program II, at the standard limit per accident of \$25,000, written as on adjunct to state workers compensation act coverage.
- (d) The endorsement Waiver of Our Right to Recover From Others (WC 00 03 13) is available if required of the employer by contract.
- (e) Coverage for an "alternate employer" if required of the employer by contract and only when the state of operations of the "alternate employer" is listed in 3.A. of the policy. The Alternate Employer Endorsement (WC 00 03 01 A) shall be utilized to provide this coverage.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.03 Applicability.

These rules shall apply to all policies issued or in effect through the Plan. Any future modifications of these rules shall not lessen the performance standards required of the Administrator, or the servicing carrier(s) or direct assignment carrier(s) during the period of the state contract or the terms of the Reinsurance Mechanism applicable to the Plan, except where mutually agreed to by all parties. The Commissioner may dissolve the Plan at any time, but such dissolution shall not affect the rights and/or liabilities of any party accrued prior to dissolution, including but not limited to, the notice and/or penalty provisions of the state contract of the Administrator.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.04 Selection of the Administrator.

- (1) The Administrator, under the supervision of the Commissioner, shall exercise its duties as outlined in this Chapter and as described in its contract with the State.
- (2) Servicing carriers shall be selected through a competitive bid process conducted by the Administrator and in accordance with applicable state regulations. All workers' compensation insurance policies issued by the servicing carriers or direct assignment carriers shall be for one (1) year periods, unless rewritten to a short term policy for lapsed coverage or otherwise

approved by the Commissioner, to eligible employers seeking such coverage under the Plan and this Chapter..

- (3) The Administrator may enter into any contracts with the servicing carriers that are necessary to implement the Plan. All servicing carriers shall cede one hundred percent (100%) of all collected premium, less their servicing carrier fee, and one hundred percent (100%) of all losses, including ALAE, and premium collection expenses to the Plan as prescribed in this Chapter.
- (4) In the event that a deficit occurs for any Plan period, all participating insurance carriers writing workers' compensation insurance in Tennessee are required to reimburse the Plan pursuant to Tenn. Code Ann. § 56-5-314, and in accordance with this Chapter.

Authority: Tenn. Code Ann. § 56-5-314.

0780-1-79-.05 Rules for Eligibility.

- (1) The following rules govern the eligibility of applicants to the Plan:
 - (a) Employers are eligible for coverage in Plan, provided that they are making application without fraud or misrepresentation, either by inclusion or omission of information, and are otherwise acting in good faith to meet their legal obligation of securing workers' compensation insurance. The Administrator and/or the servicing carrier and/or the direct assignment carrier will assume that the employer is acting without fraud or misrepresentation, unless evidence can be produced that would demonstrate otherwise.
 - (b) An employer shall be determined not to be acting in good faith, and therefore not eligible for coverage in the Plan, when any of the following conditions are existent at the time application to the plan is made or thereafter, or the existence of such other conditions not enumerated herein would indicate that the employer is not acting in good faith:
 1. An applicant who is or was a state or federally approved self-insured employer having sufficient knowledge, at the time of application, of conditions that are likely to increase the number of occupational disease or cumulative trauma injury claims filed under a Plan policy which originated from exposures while being a self-insured employer, may not be considered eligible for coverage. Such conditions may include, but are not limited to, pending bankruptcy proceedings, cessation of operations, insolvency or any event (or series of events) that would result in the dismissal of more than seventy-five percent (75%) of all employees within the first one hundred and eighty (180) days following the policy effective date;
 2. The applicant has an outstanding obligation for workers' compensation insurance premiums on a workers' compensation insurance plan, including those premiums owed as a result of a premium audit, about which there is no formal written dispute;
 3. The employer ignores or refuses to implement written safety and health recommendations, reasonably prescribed by a servicing carrier or direct assignment carrier, that are designed to remove an imminent threat of serious bodily harm; or
 4. When making application to the Plan, the employer, or its representative and/or the insurance producer, having sufficient knowledge to the contrary beforehand, made a material misrepresentation by omission or otherwise. Material misrepresentations shall include, but are not limited to the following:

- (i) Estimated annual premium;
 - (ii) Offers of workers' compensation insurance in the voluntary market at a competitive price;
 - (iii) Nature of business;
 - (iv) Name or ownership of business;
 - (v) Estimated payroll;
 - (vi) Outstanding premium obligations;
 - (vii) Previous insurance history; or
 - (viii) Such other information deemed necessary for proper underwriting and/or policy issuance by the Administrator.
- (c) An employer, within sixty (60) days prior to making application to the Plan, must have been rejected for workers' compensation insurance by two (2) non-affiliated insurers licensed to write workers' compensation insurance in the State of Tennessee.
- (2) Any employer insured by the Plan will automatically receive a renewal quotation from their designated Plan servicing carrier or direct assignment carrier, unless otherwise instructed by the Commissioner. Any employer insured under the Plan shall receive at least the same quality of service as is available to those similarly situated employers who are voluntarily insured. This includes, but is not limited to, safety engineering, loss control, claims handling, employee classification and reserving practices. Any dispute arising hereunder shall be subject to the grievance and appeals procedures specified herein.
- (a) Notwithstanding the automatic renewal provision, any employer that has been a member of the Plan for three (3) or more years must be denied by voluntary market coverage from two (2) non-affiliated insurance carriers licensed to write workers' compensation in this State before being renewed by the Plan.
- (3) An employer deemed to be ineligible for coverage in the Plan will be canceled by the servicing carrier or direct assignment carrier utilizing all required state notice requirements
- (4) Subject to this Chapter, the servicing carriers and direct assignment carriers for the Plan are responsible for losses incurred by their insured employers after the effective date of coverage under the Plan.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.06 Application Process.

- (1) An employer applying for coverage under the Plan shall submit a Plan application for insurance and to the Administrator in a manner set forth by the Administrator.
- (2) The Administrator has the authority, subject to these rules and the prior approval of the Commissioner, to establish specific rules and procedures governing this application process.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.07 Binding Coverage and Miscellaneous Rules.

Coverage is bound under the Plan, consistent with this Chapter and in accordance with the following procedures:

- (1) The insurance producer and/or the employer is responsible for forwarding the completed application form to the Administrator with a check payable to the Plan for the estimated annual or deposit premium as computed by the insurance producer, or as determined by contacting the Administrator prior to submission of the application, or by any other electronic means as becomes available and is approved by the Commissioner. The application shall be on a form approved by the Commissioner and, at a minimum, shall include the employer's latest filed federal employer 941, 941E, 942 or 943 form or equivalent federal or state verifiable current payroll record, e.g. unemployment wage report; and
- (2) The Administrator may allow filing of an application by facsimile transmission or other electronic medium, provided there is receipt of the originally signed application and deposit premium received within five (5) business days of when the facsimile is received by the Administrator.
- (3)
 - (a) For all employers, other than those that are self-insured pursuant to Tenn. Code Ann. § 50-6-405, immediately preceding application to the Plan, coverage will be bound at 12:01 a.m. on the first day following the postmark time and date on the envelope in which the application, including the estimated annual or deposit premium, is mailed, or the expiration of existing coverage, whichever is later, unless a later date is requested. If there should be no postmark or if the postmark is not discernible, coverage will be effective 12:01 a.m. of the date of receipt by the Administrator unless a later date is requested. Those applications hand delivered or delivered *via* other authorized means to the Administrator will be effective as of 12:01 a.m. the date following receipt unless a later date is requested; or
 - (b) For those employers which are self-insured pursuant to Tenn. Code Ann. § 50-6-405, immediately prior to obtaining coverage through the Plan, coverage will be bound at 12:01 a.m. following the postmark time and date on the envelope in which the application, including the estimated annual or deposit premium is mailed, or the expiration of existing coverage, whichever is later, unless a later date is requested. If there should be no postmark, or if the postmark date is not discernible, coverage will be effective 12:01 a.m. following the date of receipt by the Administrator, unless a later date is requested. Those applications hand delivered to the Administrator will be effective 12:01 a.m. following the date of receipt, unless a later date is requested.
- (4) When an eligible employer has completed a Plan application and the application and premium due have been sent as prescribed in Paragraph (1) of this Rule, the Administrator shall bind coverage, and the assigned servicing carrier or direct assignment carrier shall issue said binder and/or policy, and provide copies to the insurance producer, and the insured. The servicing carrier or direct assignment carrier shall, in accordance with any state guidelines, notify any appropriate state agency, including but not limited to the Tennessee Department of Labor and Workforce Development, regarding the implementation of insurance coverage.
- (5) No policies shall be issued under the Plan to an employer that has not met all of its workers' compensation insurance premium obligations. The Commissioner may waive this prohibition if the Commissioner is satisfied that a non-frivolous and formal legal dispute regarding such premium obligations has been appropriately filed and is pending. If, subsequent to policy issuance, an insured employer does not meet all of its workers' compensation insurance premium obligations under a previous policy or under a present policy, the servicing carrier or the direct assignment carrier may cancel a policy currently in force under the Plan, giving appropriate notice of cancellation.

- (6) A policy issued under the Plan shall be issued for a term of one (1) year, unless a continuous policy that utilizes renewal certificates is approved by the Commissioner. A policy for a term other than one (1) year must first be approved by the Commissioner unless the policy is rewritten to a short term policy due to a lapse in coverage. A copy of the policy declarations and all endorsements, and/or renewal certificate (if approved) properly stamped to indicate that it is a Plan policy, will be retained by the servicing carrier(s) or direct assignment carrier(s).
- (7) In addition to any other grounds allowed by law for the cancellation of workers' compensation policies, the Plan policy may be canceled at any time if it is discovered by the servicing carrier, direct assignment carrier or Administrator that the employer:
 - (a) Did not act in good faith in applying for coverage under the Plan;
 - (b) Disregarded any or all written health and safety recommendations of the insurer or Administrator regarding the imminent threat of serious bodily harm; or
 - (c) Violated the terms and conditions of the Plan policy or this Chapter.
- (8) Prior to canceling a policy, the servicing carrier or direct assignment carrier shall attempt to resolve the issue that provides grounds for the policy's cancellation with the employer within thirty (30) days. Failing resolution of any issue(s) between the servicing carrier, direct assignment carrier and the employer regarding the policy's cancellation, the Administrator shall be given notice prior to actual issuance of such notice of cancellation to the insured.
 - (a) Approval of the Administrator shall not be required for cancellation for non-payment of premium unless the servicing carrier or direct assignment carrier, or insured employer has invoked the dispute resolution procedures contained herein.
 - (b) Any employer whose coverage under the Plan is canceled in this manner must complete a new application and demonstrate its good faith entitlement to such insurance before assignment or reinstatement is effected. An employer may only be reinstated once with a lapse of coverage and must thereafter submit a new application to obtain workers' compensation coverage through the Plan.
- (9) The classification codes, rates, rating data, and forms utilized in the policies issued by the Plan's servicing carrier(s) and direct assignment carriers must be approved by the Commissioner.
- (10) A quotation for renewal or a notice of non-renewal due to the employer being a member of the Plan for three (3) or more years, shall be forwarded to the employer and the insurance producer of record for such employer, if any, at least sixty (60) days prior to the expiration date of the policy if the employer is in good standing with the servicing carrier or direct assignment carrier. The quotation shall include notice of impending expiration of coverage to the employer. An employer that is not being automatically renewed due to the employer being a member of the Plan for three (3) or more years must submit the denial of voluntary market coverage by two (2) non-affiliated insurance carriers licensed to write workers' compensation in this State along with the employer's premium as set forth below to maintain their coverage through the Plan. The following dates of postmark or receipt by the servicing carrier or direct assignment carrier shall apply to all renewals of policies under the Plan:
 - (a) If the required deposit premium is postmarked or received by the servicing carrier or direct assignment carrier within five (5) calendar days after the expiration date of the policy, the policy shall be renewed with all appropriate documents being retained by the servicing carrier or direct assignment carrier in accordance with this Chapter.
 - (b) If the required deposit premium is postmarked or received by the servicing carrier or direct assignment carrier more than five (5) calendar days after the expiration date of

the policy and up to and including sixty (60) days from the expiration date of the policy, the policy shall be renewed with a lapse in coverage with an effective date of the postmark date or received date with all appropriate documents being retained by the servicing carrier or direct assignment carrier in accordance with plan document rules.

- (c) If the required deposit premium is postmarked or received by the servicing carrier after sixty (60) days from the expiration date of the prior policy, the policy shall not be renewed. The employer must submit a new application to the Plan for coverage.
- (11) Any otherwise eligible employer who agrees to have its workers' compensation insurance provided by an insurer on a voluntary basis, and not through the Plan, may elect to do so at any time. The servicing carrier or direct assignment carrier for such employer shall cancel coverage, upon receipt of proof of coverage or proof of there no longer being a need for coverage, on a pro rata basis, as of the effective date of the issuance of the voluntary market insurance.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.08 Obligations of Insurance Producers.

- (1) An employer may designate a licensed insurance producer to act on its behalf in receiving and transmitting information from the servicing carrier, the direct assignment carrier, and/or Administrator. An employer may change the designated insurance producer at any time by providing notice to the servicing carrier, or the direct assignment carrier and/or Administrator. Any request for insurance producer reassignment received after the effective date of the policy will become effective as of the date of the renewal policy for purposes of paying a commission.
- (2) The insurance producer commission shall be paid at a flat rate of five percent (5%) of collected premium, net of any return premiums, except that the commissions for coverage placed in other states shall be subject to the commission structure approved for the residual market in those other states, if any, or as otherwise approved by the Commissioner.
- (3) Insurance producers who attempt to place coverage through the Plan for an employer are required to follow all provisions of this Chapter in placing such coverage, including, but not limited to verifying that the employer has been rejected for workers' compensation insurance by two (2) non-affiliated insurers licensed to write workers' compensation insurance in the State of Tennessee.
- (4) Failure of an insurance producer to meet any of the provisions of these rules in placing or renewing coverage through the Plan for an employer shall be considered a violation of Tenn. Code Ann. § 56-6-112(a) for purposes of the imposition of any disciplinary action, civil penalty or period of probation, suspension or revocation of a license against such insurance producer by the Commissioner.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.09 Obligations of Servicing Carriers.

- (1) Each servicing carrier shall make available its own staff, office space, facilities and equipment as are necessary for the performance of its obligations under this Chapter, as well as its servicing carrier agreement. Each servicing carrier shall perform its services, exercise its powers, and perform all of its duties in accordance with the terms of this Chapter, its servicing carrier agreement, and such performance standards as may be contained therein and amended from time to time by mutual agreement between the servicing carrier, the Administrator and the Commissioner.

- (2) Each servicing carrier shall process, adjust, settle, compromise, defend, litigate and pay claims arising out of the workers' compensation insurance policies issued on behalf of the Plan. Each servicing carrier shall establish and maintain such claim reserves as deemed reasonable and proper by the Commissioner and the Administrator. Each servicing carrier shall also maintain complete, orderly and accurate claim files, records and accounts in accordance with the most current volume of the Accounting Practices and Procedures Manual published by the National Association of Insurance Commissioners.
- (3) Each servicing carrier shall comply with the financial reporting requirements and procedures established from time to time by the Commissioner and/or the Administrator.
- (4) Each servicing carrier shall report to the Administrator, any change in its ability to perform its obligations as a servicing carrier hereunder, as soon as possible and, in any event, no later than ten (10) calendar days after being aware of such change.
- (5) All loss settlements made by a servicing carrier, whether under strict contract conditions or by way of compromise, shall be binding unconditionally upon the Plan. The servicing carrier shall have the sole discretion to make all decisions relating to its claim-handling authority, including decisions of whether to pursue salvage or subrogation.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.10 Participation Mandatory for Workers' Compensation Insurers.

- (1) All insurers licensed to write workers' compensation insurance in Tennessee shall participate in the Plan. An insurer may satisfy such requirement to participate in the Plan by electing to act as either of the following:
 - (a) A participating insurance carrier in the Reinsurance Mechanism; or
 - (b) A direct assignment carrier, provided that such election be approved by the Commissioner after being provided notice by the insurance carrier of not less than ninety (90) days prior to the beginning of the calendar year during which such carrier makes its election or as otherwise prescribed by the Commissioner.
- (2) An insurance carrier's election under Paragraph (1) of this Rule may not be changed during the calendar year of election, except when the Commissioner disapproves an insurance carrier's election to be a direct assignment carrier.
- (3) Insurers shall continue to be responsible for their liabilities under all prior residual market plans, as determined by the designated rate service organization under the provisions of the articles of agreement or the quota share reinsurance agreement, in addition to any deficits experienced under the Plan.
- (4) The Commissioner may enter into agreements on behalf of the participating insurers to carry out the purposes of the Plan, including, but not limited to the Reinsurance Mechanism.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.11 Accuracy of Information Provided by an Employer.

Policies issued through the Plan shall be issued under the presumption that the payroll and classification information submitted by an employer is accurate; an employer shall not be permitted to modify such information as part of its application to the Plan without the written permission of the Plan's servicing carrier, or the direct assignment carrier, or the Administrator. The servicing carrier, direct assignment carrier, or the Administrator, however, is authorized to modify such information as appropriate.

Authority: Tenn. Code Ann. §§ 56-5-314(c) and 320.

0780-1-79-.12 Effect of Rules on Employers' Obligations under Prior Plans.

This Chapter shall not change the obligations of employers to pay premiums due under any previous residual market plan used in this State. This responsibility shall include the responsibility to pay premiums owed after the policies are terminated which reflect adjustments to the employer's estimated premium made as the result of premium audits conducted within one-hundred-and-twenty (120) days of termination. This period of time may be extended by the servicing carrier or direct assignment carrier if the employer does not cooperate with the servicing carrier or direct assignment carrier in providing reasonable access to make the audit or does not comply with reasonable requests for information. Failure to pay such audit premiums shall result in making the employer ineligible for coverage under the Plan, absent the existence of a formal, non-frivolous dispute.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.13 Premiums.

Each servicing carrier is responsible for the collection of all premiums on all risks assigned to each respective servicing carrier under the Plan until such premiums become forty-five (45) days past due. At such time, the collection responsibilities will move to a collection agency designated by and contracted with the Administrator.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.14 Subrogation.

In the event that a servicing carrier recovers any money by way of subrogation or otherwise, other than from a reinsurer, on a claim for which the servicing carrier has been reimbursed by a reinsurer, the servicing carrier is responsible for reimbursing or otherwise crediting the reinsurer for amounts paid by the reinsurer on account of such claim, but not more than the total amount so recovered less expenses incurred in securing such recovery.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.15 Reinsurance Mechanism.

- (1) A participating insurance carrier shall be assessed for the amount of any deficit in proportion to the share of the voluntary workers' compensation premium written by such participating insurance carriers during the calendar year of the plan period with respect to which a deficit is incurred.
- (2) Failure of a participating insurance carrier to pay its proper assessment shall be grounds for:
 - (a) The suspension or revocation of an insurer's certificate of authority; and
 - (b) Any legal action initiated by the Administrator or the affected servicing carriers(s) against the insurer brought to recover any unpaid assessment owed to the Plan under this Chapter.
- (3) Direct assignment carriers shall not participate in any deficit assessment or surplus distribution conducted under the Plan.

- (4) In order to assist the determination of the existence of a deficit, each servicing carrier shall segregate its voluntary workers' compensation premium experience from its business transactions from Plan operations.
- (5) The expenses and duties associated with analyzing the data to determine whether there is a deficit or a surplus shall be borne by the Administrator as a function of the Administrator's responsibilities. The actuarial analysis serving as the basis for surplus or deficit is subject to the review of the Commissioner. The expenses for administering any surplus/deficit under this Rule shall be reasonable and subject to review by the Commissioner.
- (6) The Commissioner is to be apprised by the Administrator, in writing, at the end of each fiscal quarter of its actuarial estimate as to the likelihood of a deficit and the amount thereof. Such estimates shall include a valuation of the probability of any future deficits based on amounts already incurred, determined by an evaluation procedure approved by the Commissioner; such an evaluation procedure may be recommended to the Commissioner.
- (7) Should a deficit be indicated by the Administrator's actuarial estimate, the Administrator shall submit to the Commissioner a projection of when assessments are expected to begin. In addition, the Administrator shall:
 - (a) Perform all of the duties necessary to administer an assessment of the participating insurance carriers, should a deficit occur; and
 - (b) Clearly distinguish in an assessment the extent to which it is a Plan deficit or a deficit occurring under any prior residual market mechanism used in this State, if applicable.
- (8) The Administrator may prospectively reserve for and apportion assessments among the participating insurance carriers, provided that actuarially justified data is provided to the Commissioner as to the necessity and valuation of such assessments at least thirty (30) days prior to the making of such assessments.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.16 Insolvency of a Servicing Carrier.

- (1) In the event of the insolvency of a servicing carrier, any reimbursement for a deficit shall be payable by the Plan directly to the servicing carrier or to its liquidator, receiver, conservator, or statutory successor on the basis of the liability of the servicing carrier without diminution because of the insolvency of the servicing carrier or because the liquidator, receiver, conservator or statutory successor of the servicing carrier has failed to pay all or a portion of any claim.
- (2) The liquidator, receiver, conservator or statutory successor of the servicing carrier shall continue to give written notice to the Administrator of the pendency of all claims against such servicing carrier per the terms of this plan document, indicating the policies, claims or losses submitted by the servicing carrier to the Plan within a reasonable time after the claims or losses are filed in the conservation or liquidation proceeding or in the receivership. Such claims or losses will be reported to the Plan at one hundred percent (100%) of the amount of the servicing carrier's original liability to the insured and not on the basis paid or settled by the servicing carrier or its liquidator, receiver, conservator or statutory successor.
- (3) At any time during the pendency of the servicing carrier's liquidation, rehabilitation, receivership or conservatorship, the Administrator shall have a right to verify, audit, or investigate any claims or losses reported to the Plan.
- (4) The Administrator may interpose, at the expense of the Plan, in any proceeding where such claims or losses are to be adjudicated, any defense or defenses that it may deem available under

the Plan to the servicing carrier or its liquidator, receiver, conservator or statutory successor. The expense thus incurred by the Administrator on behalf of the Plan shall be chargeable, subject to the approval of the court, against the servicing carrier as part of the expense of conservation or liquidation to the extent of a pro rata share of the benefit which may accrue to the servicing carrier solely as a result of the defense undertaken by the Administrator.

- (5) Notwithstanding anything to the contrary, any specific provisions within this Rule that conflict with Tenn. Code Ann. §§ 56-9-101, *et seq.* shall be considered void and unenforceable.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.17 Surplus Administration.

- (1) In the event the combined results of the Plan (excluding results from direct assignment carriers) results in a surplus for a particular Plan period, the Administrator shall establish a surplus trust fund in a federally chartered bank which is located in Tennessee. All funds from this trust shall be earmarked to benefit the participating insurance carriers consistent with this Rule.
- (2) As determined by the Plan's plan period experience where conservative actuarial estimates may be determined, funds in the surplus trust fund shall be distributed (for each year of the distribution process) by the Administrator to the servicing carriers, minus any reserves needed for future assessments and expenses related thereto.
- (3) Participating insurance carriers shall share in the surplus allotted to participating insurance carriers based on their pro rata share of the amount of voluntary workers' compensation premiums written during the calendar year in which the surplus is incurred when compared to all voluntary workers' compensation premiums written by all participating insurance carriers collectively for the same period. Voluntary workers' compensation premiums written by direct assignment carriers and their affiliates shall be excluded when determining a carrier's pro rata share.
- (4) At no time shall a distribution of the surplus be made to any participating insurance carrier unless that distribution is in excess of twenty dollars (\$20.00). All fund disbursements that do not meet the minimum twenty dollar (\$20.00) threshold will remain in the surplus trust fund, until such funds are ultimately distributed as set forth in Paragraph (5) of this Rule. Any such funds that remain after the final disbursement shall be retained in the ALDA for final distribution once all claims have been closed. Any participating insurance carrier that has an unpaid premium balance, about which there is no formal written dispute with the Plan shall not be eligible to receive a surplus refund until such unpaid premium balance has been paid in full.
- (5) Immediately prior to the first surplus distribution, the Administrator shall place fifteen percent (15%) of the surplus funds in the ALDA until such time as all claims for policies issued during that particular calendar year have been closed. At such time when all claims have been closed, all funds, including investment income, in the ALDA shall be distributed to the participating insurance carriers in the same pro rata manner as described in Paragraph (3) of this Rule.
- (6) For each calendar year period of the Plan, the method by which the trust will be funded is as follows:
 - (a) Fifty percent (50%) of the funds in the surplus trust fund, excluding those funds held in the ALDA, shall be determined at that time and distributed to the trust recipients twelve (12) months following the expiration of each one (1)-year plan period of the Plan.
 - (b) Fifty percent (50%) of the remaining funds in the surplus trust fund, excluding those funds held in the ALDA, shall be transferred to the trust recipients twenty-four (24) months following the expiration of each one (1)-year plan period of the Plan.

- (c) Fifty percent (50%) of the remaining funds in the surplus trust fund, excluding those funds held in the ALDA, shall be transferred to the trust recipients thirty-six (36) months following the expiration of each one (1)-year plan period of the Plan.
 - (d) One-hundred percent (100%) of the remaining funds in the surplus trust fund, excluding those funds held in the ALDA, shall be transferred to the trust recipients forty-eight (48) months following the expiration of each one (1)-year plan period of the Plan.
- (7) An actuarial review of the surplus trust fund for each plan period shall occur annually in order to ensure that the fund adequately reflects changing economic and market conditions, and any significant change in the development of the loss experience for the particular Plan period. The Administrator, acting on behalf of the Plan, shall retain a certified public accounting firm, subject to approval by the Commissioner, to act as the administrator of any disbursement of monies in the surplus trust fund, and shall provide for an annual report of any particular surplus trust fund plan period. The actuarial analysis serving as the basis for surplus or deficit is subject to the review of the Commissioner. In the event that the experience deteriorates to the point where a surplus becomes a deficit, all of the deficit shall be paid as per the Reinsurance Mechanism set forth in this Chapter.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.18 Interstate Assignments.

- (1) Any employer assigned to a servicing carrier or direct assignment carrier under the Plan is provided with coverage for its Tennessee-based employees who may have business reason to travel to other states, including the District of Columbia, on a temporary and incidental basis where the duration of the operations in the other state is less than ninety (90) days. The servicing carrier or direct assignment carrier shall furnish such insurance on an endorsement form approved by the Commissioner. Such form shall indicate that employees based out of states other than Tennessee are not covered by this endorsement.
- (2) An employer with operations in other states that have a duration of ninety (90) days or more must notify the servicing carrier regarding the need for insurance in such additional states for their Tennessee workers.
 - (a) The servicing carrier(s) for the Plan will, upon the request of an employer, offer coverage for Tennessee domiciled employers for any of the fifty (50) states in which their employers have exposures except states with monopolistic state funds, or competitive state funds, joint underwriting associations, non-participating pools, or other states that have not agreed to allow the Plan to provide such coverage extensions.
 - (b) Extension of coverage to another state will only be provided as long as the payroll exposures in such other state are less than the Tennessee payroll exposures, and the payroll attributable to such other exposures in such other states does not exceed two hundred fifty thousand dollars (\$250,000) during any one (1) plan period. Such coverage extensions to another state shall be considered to be another state's coverage exposure, and therefore, it will be counted as a Plan premium, and will be reinsured through the Reinsurance Mechanism, unless reinsured by an alternative mechanism acceptable to the servicing carriers and the Commissioner. Such coverage will be subject to these rules, where it does not conflict with the other state's rating plans or rules.
 - (c) Employers domiciled outside of Tennessee with Tennessee exposures shall not have their non-Tennessee exposures insured under the Plan.

- (3) The Administrator shall provide assistance to employers seeking coverage in those states where coverage is not available through the Plan. The Administrator shall provide basic information to assist employers in obtaining coverage in those other states.

Authority: Tenn. Code Ann. § 56-5-314(c).

0780-1-79-.19 Assignment Formula.

All employers qualifying for coverage under the Plan shall be randomly assigned by the Administrator to the servicing carrier(s) and direct assignment carriers, in keeping with their assigned premium proportion.

Authority: Tenn. Code Ann. § 56-5-314(c)

0780-1-79-.20 Dispute Resolution Procedure.

- (1) It shall be the function of the Administrator to facilitate the resolution of disputes over the general operation of the Plan arising from the servicing carriers, the direct assignment carriers, and insured, insurance producers or others, as opposed to disputes arising under the Reinsurance Mechanism. Disputes arising under the Reinsurance Mechanism by other insurers or others affected shall be resolved by the Administrator or the Commissioner and shall be resolved in accordance with the requirements provided in Rule 0780-1-79-.15.
 - (a) Any person affected by the operation of the Plan may file a formal dispute with the Administrator. Such dispute must set forth in writing with particularity the nature of the dispute, the parties to the dispute and the relief sought and basis thereof. In cases involving premium, any undisputed premium must continue to be paid to continue coverage. The Administrator may secure such additional information it deems necessary to make a decision.
 - (b) Upon receiving the written dispute, the Administrator shall notify the Commissioner by sending a copy of the written dispute to the Department.
 - (c) The Administrator shall render a decision in writing regarding the dispute within thirty (30) calendar days of receiving enough information to make a decision. The decision shall be in the form of a policy-related action to correct or amend the disputed issue, or a written explanation of the specific reasons the dispute is determined invalid. The Administrator shall include with its explanation the ability to appeal the Administrator's decision and the process for filing the appeal.
 - (d) As part of the formal dispute process, the Administrator will make available, at no cost to either party, a client-relations consultant who shall act as an impartial, third-party dispute resolution facilitator, should both parties desire to use the services of the client-relations consultant.
- (2) Any party adversely affected by a decision made by the Administrator concerning a formal dispute or a decision rendered in the administration of the Reinsurance Mechanism may appeal such decision to the Commissioner. All such appeals must:
 - (a) Be in writing and filed with the Commissioner within thirty (30) days of receipt of the notice of the decision of the Administrator;
 - (b) Contain a short and plain statement as to what portion of the Administrator's decision is being appealed and the grounds for such appeal. The appellant must also file the written decision made by the Administrator; and

- (c) Be sent to all parties to the dispute at the same time the appeal is filed with the Commissioner. In sending the appeal, the appellant may use any method allowed by law for legal service of process.
- (3) Any hearing of an appeal by the Commissioner shall be conducted in accordance with all applicable provisions of law, including the “contested case” provisions of the UAPA at Tenn. Code Ann. §§ 4-5-301, *et seq.*, the Uniform Rules of Procedures for Hearing Contested Cases Before State Administrative Agencies at Tenn. Comp. R. & Regs. ch. 1360-4-1 and the Tennessee Rules of Civil Procedure.
- (4) Unless otherwise determined by the Commissioner, the Commissioner or his/her designee shall hear all such appeals in the presence of an administrative judge, as authorized by Tenn. Code Ann. § 4-5-301.
- (5) The Insurance Division of the Department may intervene in any appeal authorized under this Rule.
- (6) The Workers’ Compensation Appeals Board is hereby dissolved as of the effective date of these rules with respect to the Plan and any appeals subject to be heard by the Board as of the effective date of these rules shall be transferred over to the Commissioner immediately to be heard in a manner consistent with this Rule.

Authority: Tenn. Code Ann. §§ 56-5-309 and 314(c).

0780-1-79-.21 Rate Monitoring.

- (1) The servicing carrier(s) and direct assignment carrier(s) are required to report experience on business written under the Plan to the designated rate service organization authorized by the Commissioner pursuant to Tenn. Code Ann. § 56-5-320. The designated rate service organization shall provide to the Commissioner all requested information necessary for establishing reasonable classifications, rates, and financial information required for the successful operation of the Plan and the total market, and for whatever other purposes the Commissioner from time to time may require for said data.
- (2) Plan rates shall be filed and reviewed in accordance with all laws generally applicable to workers’ compensation insurance rates.

Authority: Tenn. Code Ann. §§ 56-5-314(c) and 320.

Rule 0780-1-79-.22 Non-Public Personal Information.

- (1) For purposes of this Rule, the term servicing carrier shall include any reinsurers, subcontractors, vendors, insurance producers or other entities or persons utilized by or associated with the servicing carrier in the administration and insuring of the Plan.
- (2) Non-public personal information, whether provided orally, in writing, via computer media, or by other means, given to insurance producers, agencies, brokers, insurers, or their clients, required to properly evaluate, underwrite and insure risks in accordance with the plan document, shall be provided by such persons and entities to the servicing carrier(s) for the evaluation, underwriting and insurance purposes. In consideration of the disclosure of such information, the servicing carrier(s) agree(s) to and shall comply with the following provisions:
 - (a) Except as required by law, the servicing carrier(s) and/or Administrator shall keep in confidence and shall not, except as directed by the insured, disclose to any third party, or use for the benefit of any third party, such non-public personal information, regardless of the form or format of the disclosure; such information shall be used by the

- servicing carrier(s) solely for the evaluating, underwriting and insuring of workers' compensation insurance coverage under the Plan, and not for any other purpose without the prior approval of the insured.
- (b) The servicing carrier(s) and/or Administrator shall take all reasonable measures necessary to protect the confidentiality of non-public personal information in its possession from disclosure to any other third party, except as directed by the insured. The employees of the Administrator shall be required to sign a confidentiality agreement that meets the effect of this Rule. The servicing carrier has no obligation to incur any expenses resisting legal or regulatory process requiring the tender of non-public personal information.
 - (c) The servicing carrier(s) and/or Administrator shall not use any non-public personal information in the furtherance of directly or indirectly requesting, encouraging, or advising any employers who have acquired or seek to acquire coverage through the Plan to utilize the services of any specific insurance producer, agency, broker, insurer or group of insurers for workers' compensation insurance coverage. Notwithstanding the above, non-public personal information shall not include information that:
 - 1. Was already in the servicing carrier's or Administrator's possession prior to such information being provided pursuant to this plan document;
 - 2. Becomes generally available to the public other than as a result of any disclosure by the servicing carrier or Administrator;
 - 3. Becomes available to the servicing carrier or Administrator on a non-confidential basis from a source not known to the servicing carrier or Administrator to be bound by a confidentiality agreement or other obligation of secrecy; or
 - 4. Was developed by the servicing carrier or Administrator independently and without the benefit of information disclosed pursuant to this Chapter.
 - (d) The servicing carrier(s) and/or Administrator shall not give any other person, firm or entity any rights that would circumvent or violate the provisions of this Rule.
- (3) Notwithstanding the confidentiality provisions set forth in this Rule, the Commissioner, the Commissioner of the Tennessee Department of Labor and Workforce Development and any other organization or entity designated by the Commissioner to gather and analyze data for the purpose of establishing rate or loss cost information, or in conjunction with the issuance of reports concerning the workers' compensation market shall have complete and full access to all data, information, and records, whether in printed or electronic form, that is gathered by the servicing carriers, the Administrator, the designated rate service organization, or by any other entity or person. Such access shall include the prompt production of such data, information and records to the Commissioner or the Commissioner of Tennessee Department of Labor and Workforce Development upon request. No charge or fee may be assessed by the servicing carriers, the Administrator or by the designated rate service organization to the Commissioner of the Tennessee Department of Labor and Workforce Development in relation to the production of such information.

Authority: Tenn. Code Ann. § 56-5-314(c).

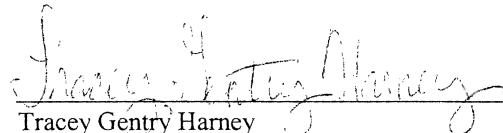
Legal contact and/or party who will approve final copy for publication:

John F. Morris or
Tracey Gentry Harney
Department of Commerce
And Insurance
5th Floor, Davy Crockett Tower
500 James Robertson Parkway
Nashville, TN 37243
615-741-2199

Contact for disk acquisition:

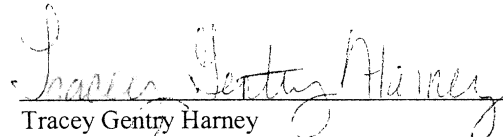
John F. Morris or
Tracey Gentry Harney
Department of Commerce
And Insurance
5th Floor, Davy Crockett Tower
500 James Robertson Parkway
Nashville, TN 37243
615-741-2199

Signature of the agency or officers directly responsible for proposing and/or drafting these rules:



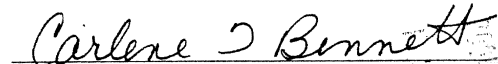
Tracey Gentry Harney
Staff Attorney

I certify that this is an accurate and complete representation of the intent and scope of rulemaking proposed by the Commissioner of Commerce and Insurance.



Tracey Gentry Harney
Staff Attorney

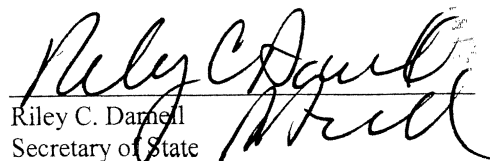
Subscribed and sworn to before me this the 29th day of October, 2004



Notary Public

My commission expires on the 20th day of Sept, 2005.

The notice of rulemaking set out herein was properly filed in the Department of State on the 29 day of Oct., 2004.



Riley C. Darnell
Secretary of State

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