

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

Chapter 0780-1-54
Self-Insured Workers' Compensation Pools

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. § 4-5-101 *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(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 0780-1-54-.01 Purpose and Scope

It was commented that the proposed rules treat the pools as insurance carriers and negates the original purpose and scope of the existing rules.

Agency Response to Comment 1

The purpose of these proposed rules is to provide a comprehensive regulatory framework for self-insured workers' compensation pools. These rules attempt to recognize the structural and practical differences between self-insuring pools and commercial insurance companies. However, the Department does recognize that such pools and insurance companies are nearly identical often times in their function and purpose. These proposed rules attempt to strike the balance between applying traditional insurance regulatory requirements on the pools and recognizing the peculiar structure of the pools. The Department believes it is important to emphasize its belief that the joint and several nature of the pools warrant the imposition of certain regulatory requirements not imposed on commercial insurance companies.

Comment 2

Rule 0780-1-54-.02 (6) Definitions

It was commented that the definition of “Pool Year” should be clarified to mean the twelve (12) months within a pool’s fiscal year, as some pools are not on a calendar year basis.

Agency Response to Comment 2

The Department agrees with this comment and will amend the definition of “Pool Year” to recognize that all pools are not on a calendar year basis.

Comment 3

Rule 0780-1-54-.02(9) Definitions

It was commented that the Department should specifically state which statutes and regulations are applicable to pools rather than the reference to “Insurance Law” that is found in the current definition. It was suggested that the Department affirmatively state that only those provisions in Title 56 specifically referenced in this Rule would apply to the pools.

Agency Response to Comment 3

Paragraph (9) of this Rule only seeks to define the meaning of the term “Insurance Law” as used in this Chapter.

Comment 4

Rule 0780-1-54.02 (11) Definitions

The definition of “Loss Reserves” is funds of the pool immediately available to pay:

- (a) known or open claims and expenses associated therewith;
- (b) IBNR and expenses associated therewith;
- (c) unearned premiums;
- (d) bad or uncollectible debts; and
- (e) expenses associated with run-off or termination of a pool.

It was commented that unearned premium reserves are established separately and should not be included in loss reserves.

Agency Response to Comment 4

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 5

Rule 0780-1-54.02 (11) Definitions

It was commented that bad debts or uncollectible reserves should be established in accordance with insurance company guidelines for uncollectible debt as being those which reach ninety (90) days past due, and should not be included in loss reserves.

Agency Response to Comment 5

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment. However, the Department believes that each pool should establish reserves for bad debt that is separate from its loss reserves.

Comment 6

Rule 0780-1-54.02 (11) Definitions

It was commented that the bulk of expenses associated with termination of the pool are losses and allocated loss adjustment expenses (ALAE). It was commented that any other amounts are indeterminable and until such time as the company enters run-off, and should not be included in loss reserves.

Agency Response to Comment 6

The Department does not concur with this comment.

Comment 7

Rule 0780-1-54-.02(18) Definition

It was commented that the definition of "sponsoring association" be amended to include the specific association requirements contained in Tenn. Code Ann. § 50-6-405(c).

Agency Response to Comment 7

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 8

Rule 0780-1-54-.04 Application for a Certificate of Authority

Subsection (2)(c)(2) of this Rule requires submission of documentation establishing the rate at which insurance producers will be commissioned to solicit membership into the pool. It was commented that since the Department has not attempted to regulate the commissions of insurance producers in the voluntary market, this language should be clarified that the proposed authority still remains with the pool's Board of Trustees.

Agency Response to Comment 8

The authority to set the rate for commissions to insurance producers continues to remain with the pools' Board of Trustees. However, this information must still be filed with the Department as part of a pool's application for a certificate of authority. The Department has a legitimate government interest in ensuring that commissions paid to insurance producers are not excessive given the joint and several nature of the pools.

Comment 9

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that Subsection (2)(d)(1) of this Rule should be clarified to state what is considered acceptable evidence to the Commissioner evidencing the pool's ability to pay their obligations.

Agency Response to Comment 9

The purpose of this requirement is to give the Commissioner and the pool the flexibility of evaluating each pool on a case by case basis since each pool has a slightly different operational structure. If the Department were to provide an exhaustive list of factors, the flexibility would be removed and, for that reason, the Department does not concur with this comment.

Comment 10

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that the Department should state what is to be considered proof of payment to the pool by each member as required by Subsection (2)(d)(2) of this Rule. It was commented that the current rules require payment of twenty-five percent (25%) of the member's first quarter premium. It was requested that the Department provide guidance on whether this will continue to be acceptable proof of payment.

Agency Response to Comment 10

The Department believes that each member should be required to pay at least twenty-five percent (25%) of the first year's premium. The Department has amended the Rule to reflect this position.

Comment 11

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that Subsection (2)(e)(3) of this Rule requiring each member's experience modification to be submitted should be amended to acknowledge that some members may not be large enough to be experience rated by the National Council on Compensation Insurance ("NCCI") and would not have an experience modification factor.

Agency Response to Comment 11

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 12

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that Subsection (2)(e)(4) of this Rule requiring documentation evidencing a member's loss runs for the past four (4) year should be amended to acknowledge the fact that some companies may not have been in existence for four (4) years but are still eligible for membership.

Agency Response to Comment 12

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 13

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that the quarterly report required by Subsection (2)(e)(5) of this Rule should be amended to only require the most recent fiscal year financial statement.

Agency Response to Comment 13

The Department understands that not all members will have quarterly reports prepared, as such the Department has amended this Rule to only require such reports if they have been prepared.

Comment 14

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was suggested that the Department add the word “or” after the semicolon in Subsection (2)(e)(5)(i) of this Rule.

Agency Response to Comment 14

The Department does not concur with this comment.

Comment 15

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was suggested that the Department add “or such other financial statements as the Commissioner may accept” after Subsection (2)(e)(5)(iii) of this Rule.

Agency Response to Comment 15

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 16

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that Subparagraph (3)(a) of this Rule should be more clearly stated since the pools have always understood they needed approval of the class codes prior to starting each pool.

Agency Response to Comment 16

The Department believes that Subparagraph (3)(a) of this Rule is clearly stated and does not need to be amended as the commenter suggests and therefore, does not concur with this comment.

Comment 17

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that Subsection (3)(b)(3) of this Rule requiring proof of each member's financial condition should be deleted.

Agency Response to Comment 17

The Department does not concur with this comment. Due to the joint and several nature of the pools, the Department cannot determine a pool's true financial condition without knowing each member's financial condition. This provision will assist the Department in determining if a particular member, and ultimately the pool, is financially able to accept the obligations of the members.

Comment 18

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that the Department should specify which other documents the Department may find relevant pursuant to Subsection (3)(b)(4) of this Rule.

Agency Response to Comment 18

The purpose of this requirement is to give the Commissioner and the pool the flexibility of evaluating each pool on a case by case basis since each pool has a slightly different operational structure. This provision gives the Department the ability to ask for additional documentation it deems relevant in order to determine a pool's financial condition. If the Department were to provide an exhaustive list, the flexibility would be removed and, for that reason, the Department does not concur with this comment.

Comment 19

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that the requirement that a pool maintain both specific and aggregate excess insurance should be amended to allow the pool to forego the purchase of aggregate excess coverage if not needed or available.

Agency Response to Comment 19

The Department interprets the proposed rules as giving a pool the ability to forego aggregate excess coverage in the event such coverage either is not obtainable or provides no additional protection to the pool's members. The Department has, however, amended this Rule in order to more clearly state such ability.

Comment 20

Rule 0780-1-54-.04 Application for a Certificate of Authority

A comment was made which questioned whether the Department should approve the specific and aggregate policy form and amounts pursuant to Subsection (3)(c)(1) of this Rule when the pool's actuary has already made the determination.

Agency Response to Comment 20

The Department does not concur with this comment. The purpose of this provision is to allow the Department to require specific excess amounts in the event that the Department does not agree with the opinion of a pool's actuary. Such authority is necessary in order to ensure the financial soundness of the pools.

Comment 21

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that the Department should clarify what criteria the Department will use to determine if a specific and/or excess insurance policy is not sufficient to meet the pool's responsibilities.

Agency Response to Comment 21

The proposed Rule currently lists a few different factors which may be used in considering whether a pool should be required to obtain additional excess coverage. The purpose of this requirement is to give the Commissioner and the pool the flexibility of evaluating each pool on a case by case basis since each pool has a slightly different operational structure. If the Department were to provide an exhaustive list of factors, the flexibility would be removed and, for that reason, the Department does not concur with this comment.

Comment 22

Rule 0780-1-54-.04 Application for a Certificate of Authority

It was commented that Subsection (3)(d)(3) of this Rule should be clarified to reflect that a member is not liable for pool years or portions of pool years' liability in which they were not a participant.

Agency Response to Comment 22

The Department does not concur with this comment. The Rule has been amended to clarify that each member is jointly and severally liable for all liabilities incurred during any fund year in which the employer was a member.

Comment 23

Rule 0780-1-54-.04 Application for a Certificate of Authority

A comment was made which questioned whether the Commissioner should have to make a similar determination pursuant to Subparagraph (3)(f) of this Rule when the pool's actuary has already made such a determination.

Agency Response to Comment 23

The Department does not concur with this comment.

Comment 24

Rule 0780-1-54-.05 Continued Reporting Requirements

It was commented that the Department should assure the pools that the Department does not intend to impose filing fees on existing pools in order to come into compliance with the new regulations.

Agency Response to Comment 24

Pools not wishing to have to pay the filing fee required by this Rule to come into compliance with the amendments contemplated by these proposed rules should file all relevant documents prior to the effective date of these rules.

Comment 25

Rule 0780-1-54-.05 Continued Reporting Requirements

It was commented that the Department should not impose filing fees on pools for routine updates, such as an individual pool participant's change of address, telephone number(s), etc. It was commented that it was appropriate for the Department to charge a filing fee in situations when the pool initiate substantive plan amendments.

Agency Response to Comment 25

The Department does not concur with this comment.

Comment 26

Rule 0780-1-54-.06 Board of Trustees

It was commented that Paragraph (1) of this Rule would prohibit individuals who are affiliated with the administrator (not the third party administrator) from serving as a member of the pool's board of trustees. It was commented that this prohibition is appropriate when the administrator is an outside, unrelated party but not appropriate when all are members of the pool and subject to the joint and several liability nature of the pool structure. It was requested that the Department amend this rule to allow identical board members of the Administrator and the pool in situations where all directors of the administrator, which is a wholly-owned subsidiary of the sponsoring trade association, and all Trustees of the pool are identical and are all members of the pool and all serve without compensation and expense reimbursement.

Agency Response to Comment 26

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 27

Rule 0780-1-54-.07 Administrators

It was commented that formal licensing and fee requirements for administrators should be removed since there appears to be no additional public protection measures gained by such activity.

Agency Response to Comment 27

The Department does not concur with this comment.

Comment 28

Rule 0780-1-54-.07 Administrators

It was commented that it was not evident what standards will be used to create the Department's licensing requirement and what information will be used to determine that such licensing will improve the management of the pool.

Agency Response to Comment 28

The standards under which the Department will review an application under this Rule are outlined in Paragraph (3) of this Rule as well as Rule 0780-1-54-.22.

Comment 29

Rule 0780-1-54-.07 Administrators

It was commented that the Department should clarify whether the reference to "administrator" in Paragraph (7) of this Rule means "administrator" as defined in Paragraph (1) of Rule 0780-1-54-.02 or "third party administrator."

Agency Response to Comment 29

The term "Administrator" as used in this Rule is defined in Rule 0780-1-54-.02 Paragraph (1).

Comment 30

Rule 0780-1-54-.07 Administrators

It was commented that requiring financial statements to be filed by a pool administrator pursuant to Subparagraph (3)(a) of this Rule should be deleted.

Agency Response to Comment 30

The Department has amended this Rule so that the financial statement filing requirement only applies to those administrators that are not natural persons.

Comment 31

Rule 0780-1-54-.07 Administrators

It was commented that Subparagraph (3)(b) of this Rule requiring the pool's administrator to obtain a fidelity bond should be clarified to allow for the administrator or the pool, on the administrator's behalf, to demonstrate that a fidelity bond has been secured.

Agency Response to Comment 31

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 32

Rule 0780-1-54-.07 Administrators

It was commented that pool administrators could not secure individual errors and omissions insurance as required by Subparagraph (3)(c) of this Rule.

Agency Response to Comment 32

The Department has amended this Rule to provide discretion to the Department to waive this requirement in the event an applicant provides proof of an inability to obtain such coverage.

Comment 33

Rule 0780-1-54-.07 Administrators

It was commented that Paragraph (5) of this Rule requiring the written contract between a pool and the administrator to set forth the entire amounts of compensation should be amended to read, “and the method for calculating the entire amount of compensation” to allow for the administrator’s fee to be based on earned premium.

Agency Response to Comment 33

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 34

Rule 0780-1-54-.07 Administrators

It was commented that Paragraph (6) of this Rule should be deleted.

Agency Response to Comment 34

The Department does not concur with this comment.

Comment 35

Rule 0780-1-54-.07 Administrators

It was commented that Paragraph (7) of this Rule should be modified to allow recognition of the current national practice, which allows pool administrators to share in the commission for the procurement of excess insurance.

Agency Response to Comment 35

The Department does not concur with this comment. The Department does not wish to prohibit a pool from compensating its administrator for services provided in the procurement of excess insurance coverage on behalf of the pool. The proposed rules, however, do prohibit allowing an administrator from receiving a commission from the excess insurance carrier as such creates a conflict of interest.

Comment 36

Rule 0780-1-54-.07 Administrators

It was commented that the Administrator should be allowed to handle the placement of the excess insurance as long as the Administrator is contractually required to disclose the commissions received to both the pool and the Department.

Agency Response to Comment 36

The Department does not concur with this comment. The Department does not wish to prohibit a pool from compensating its administrator for services provided in the procurement of excess insurance coverage on behalf of the pool. The proposed rules, however, do prohibit allowing an administrator from receiving a commission from the excess insurance carrier as such creates a conflict of interest.

Comment 37

Rule 0780-1-54-.07 Administrators

It was commented that if the Department chooses to not allow the Administrator to collect commissions on the placement of the excess insurance, then it should be clear that the Administrator is permitted to place the excess insurance and that it can contractually agree with the pool's board to a placement fee.

Agency Response to Comment 37

The Department does not concur with this comment. The Department does not wish to prohibit a pool from compensating its administrator for services provided in the procurement of excess insurance coverage on behalf of the pool. The proposed rules, however, do prohibit allowing an administrator from receiving a commission from the excess insurance carrier as such creates a conflict of interest.

Comment 38

Rule 0780-1-54-.08 Members of the Pool

It was commented that rather than the twenty-five percent (25%) deposit being retained by the Department, the pool(s) would suggest the following options in an amount not to exceed five hundred thousand dollars (\$500,000):

- twenty-five percent (25%) premium deposit to be retained by the pool;
- pledged securities in the form of negotiable securities, a secured surety bond, a certificate of deposit, or a letter of credit;

- consideration of whether the state should establish guaranty pool coverage for self-insureds;
- audit each pool annually to better determine the amount of the surety; or
- require quarterly un-audited financials from the pools that would be reviewed immediately by the Department so that questionable trends could be addressed.

Agency Response to Comment 38

The Department has amended the Rule to remove this requirement. The Department anticipates amending this Rule in the future to address the need for further financial security.

Comment 39

Rule 0780-1-54-.08 Members of the Pool

It was commented that having to get the Department's approval for new members negates the professional training and services provided by trained underwriters and undermines the management provided by pool trustees.

Agency Response to Comment 39

The Department does not concur with this comment. This Rule does not give the Commissioner the authority to approve a new member, however, it does provide the Commissioner the authority to order a pool to cancel a new member that did not meet the pool's currently approved underwriting guidelines.

Comment 40

Rule 0780-1-54-.08 Members of the Pool

It was commented that pools have a fiduciary duty to their members and a statutory requirements to give them thirty (30) days notice of cancellation. It was commented that Subparagraph (3)(a) of this Rule would give the Department power to override the thirty (30) days statutory notice period. It was suggested that this Rule be clarified to make it consistent with the statutory thirty (30) day cancellation provision.

Agency Response to Comment 40

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 41

Rule 0780-1-54-.08 Members of the Pool

It was commented that Subparagraph (3)(a) of this Rule should be clarified to state what is the appropriate premium to charge a member during the thirty (30) days period where the cancelled member retain coverage pursuant to the cancellation notice statute.

Agency Response to Comment 41

The Department concurs with this comment and the proposed rules have been amended in order to specify that a pool may charge the cancelled member a pro-rata amount of the quoted yearly premium as well as any amount due upon audit of the employer.

Comment 42

Rule 0780-1-54-.08 Members of the Pool

Subparagraph (3)(a) of this Rule allows the Department to order a pool to cancel the membership of a member if that member does not meet the pool's current and approved underwriting guidelines. It was commented that if a pool uses underwriting guidelines which does not permit it to write a member whose experience modifier exceeds a certain amount, and also allows an existing member that develops an impermissible experience modifier during the course of the pool year, that the Department allow these existing members that develop experience modifier that would place them outside of the pool's underwriting guidelines to remain in the pool.

Agency Response to Comment 42

The proposed rule would not prohibit the practice outlined in this comment so long as the pool expressly provided for this allowance in its by-laws and/or underwriting guidelines, and such guidelines have been approved by the Department.

Comment 43

Rule 0780-1-54-.08 Members of the Pool

It was commented that Paragraph (7) of this Rule allows a pool to cancel a member pursuant to its by-laws but requires the pool to maintain coverage to the cancelled member for thirty (30) days. It was commented that this thirty (30) day period should also apply in situations when the Department has exercised its cancellation power pursuant to Subparagraph (3)(a) of this Rule.

Agency Response to Comment 43

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 44

Rule 0780-1-54-.08 Members of the Pool

It was commented that the Department should clarify that the pool is permitted to charge a premium to a member that has been cancelled and is receiving their thirty (30) days of extended coverage after cancellation pursuant to Paragraph (7) of this Rule.

Agency Response to Comment 44

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment

Comment 45

Rule 0780-1-54-.08 Members of the Pool

It was commented that Paragraph (8) of this Rule should more clearly identify what constitutes attestation by the pool regarding extraterritorial coverage.

Agency Response to Comment 45

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 46

Rule 0780-1-54-.08 Members of the Pool

It was commented that the requirement that a member is to remain jointly and severally liable for the entire pool year even if the member terminates its coverage or is cancelled by the pool pursuant to Paragraph (10) of this Rule should be removed.

Agency Response to Comment 46

The Department does not concur with this comment. The Department believes the administrative burden of applying joint and several liability only to the liabilities that arose during the portions of the year in which the employer was a member of the pool would be excessive.

Comment 47

Rule 0780-1-54-.08 Members of the Pool

It was commented that the provision requiring that a member's coverage cannot take effect until that member has been approved by the Board of Trustees places an additional burden on the Administrator and the Board. It was requested that the Rule allow for the Administrator to bind coverage on a member that falls within the underwriting guidelines set by the Board as long as member's approval is subsequently voted on by the Board at the next meeting.

Agency Response to Comment 47

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 48

Rule 0780-1-54-.08 Members of the Pool

It was commented that Paragraph (12) of this Rule requiring each member's financial statements to be filed with the Department should be deleted. In the alternative, it was suggested that the Department accept a Balance Sheet as an acceptable statement of financial condition, which statement could be filed with the Department on a bi-annual basis.

Agency Response to Comment 48

The Department does not concur with this comment. Due to the joint and several nature of the pools, the Department cannot determine a pool's true financial condition without knowing each member's financial condition. This provision will assist the Department in determining if a particular member, and ultimately the pool, is financially able to accept the obligations of the members.

Comment 49

Rule 0780-1-54-.08 Members of the Pool

It was commented that the requirement that each individual member file financial statements every year is unable for many small businesses that are in the pool. It was commented that many of the members hold a professional license from one of the regulatory boards under the control of the Department. It was suggested that the Department should accept the financial statements that are filed with the licensing board every two (2) years rather than making every pool member file financial statements every year.

Agency Response to Comment 49

The Department does not concur with this comment. Due to the joint and several nature of the pools, the Department cannot determine a pool's true financial condition without knowing each member's financial condition. This provision will assist the Department in determining if a particular member, and ultimately the pool, is financially able to accept the obligations of the members.

Comment 50

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that a pool should only have to report to the Department when there is a twenty-five percent (25%) decrease in premiums or a twenty-five percent (25%) increase in claims cost.

Agency Response to Comment 50

Based on this comment, and as referenced in the agency response to Comment 53, the Rule has been amended to instead require un-audited financial statements from each pool on or before April 1 of each year.

Comment 51

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that the regulation of financial reporting for pools is different from the regulation of financial reporting for insurance companies. Insurance companies are constantly involved in all phases of acquiring, retaining, and auditing business and they can compile and present financial statements at any time with very few problems. However, since pools must audit all of their members after the end of the policy period, it takes such programs a longer time to prepare meaningful financial statements.

Agency Response to Comment 51

It is the Department's understanding that such facts were taken into account in 2002 when the General Assembly amended Tenn. Code Ann. § 50-6-405(c) to extend the reporting requirements for the pools.

Comment 52

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that the Department should either substantially revise or drop the requirement that when a pool determines that they will have a twenty-five percent (25%) deviation in premiums or claims from the previous year, the pool shall file with the Department on or before ninety (90) days after the end of the pool's fiscal year a statement as to the pool's financial condition on the day of the pool's last fiscal year.

In the alternative, it was suggested that the Department require each pool to report its incurred loss ratio (exclusive of IBNR) separately for each pool year of operation on a quarterly basis. This statistic is reported incurred loss (paid plus outstanding case reserves) as evaluated by the Trust's third party administrator divided by the earned portion of the Trust's written premium for the period.

Agency Response to Comment 52

Based on this comment, and as referenced in the agency response to Comment 53, the Rule has been amended to instead require un-audited financial statements from each pool on or before April 1 of each year.

Comment 53

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that the Department should delete Paragraph (1) of this Rule in its entirety and revise it to simply require the pools to submit an "un-audited" internal financial statement on or before April 1 of each year, to be followed by the more comprehensive report required in Paragraph (2) of this Rule.

Agency Response to Comment 53

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 54

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that it was unclear whether the twenty-five percent (25%) deviation was referring to frequency or severity of claims.

Agency Response to Comment 54

Based on this comment, and as referenced in the agency response to Comment 53, the Rule has been amended to instead require un-audited financial statements from each pool on or before April 1 of each year.

Comment 55

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that any form of statutory accounting system for the pool is objected to because of the increased cost for compliance.

Agency Response to Comment 55

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 56

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that the Department should clarify whether the Department would require an actuarial opinion from the pool if there was not a twenty-five percent (25%) deviation in premiums or claims for that year.

Agency Response to Comment 56

The proposed rules require an actuarial opinion each year for various purposes enumerated in the proposed rules. However, as referenced in the agency response to Comment 53, the Rule has been amended to instead require un-audited financial statements from each pool on or before April 1 of each year.

Comment 57

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that the ninety (90) days time period is not sufficient for the pools to determine if there is in fact a deviation triggering the need for the twenty-five percent (25%) deviation in premiums or claims for that year.

Agency Response to Comment 57

Based on this comment, and as referenced in the agency response to Comment 53, the Rule has been amended to instead require un-audited financial statements from each pool on or before April 1 of each year.

Comment 58

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that the Department should provide clarification on what other reports the Commissioner may require under Paragraph (4) of this Rule.

Agency Response to Comment 58

Paragraph (4) of the Rule enumerates others types of reports which may be requested by the Commissioner. The purpose of this requirement is to give the Commissioner and the pool the flexibility of evaluating each pool on a case by case basis since each pool has a slightly different operational structure. If the discretionary language is removed, the flexibility is also removed and, for that reason, the Department does not concur with this comment.

Comment 59

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that the Department's utilization of the penalty provision in Paragraph (5) of this Rule for a pool's failure to file any of the Rule's required financial statements would be unfair as pools must receive such financial statements from other sources beyond the pool's control.

Agency Response to Comment 59

The penalty provisions of Paragraph (5) of this Rule are taken directly from Tenn. Code Ann. § 50-6-405(c).

Comment 60

Rule 0780-1-54-.09 Financial Statements and Other Reports

It was commented that the Department should clearly state the applicable insurance statute that would apply in Paragraph (5) of this Rule rather than simply referencing all insurance laws.

Agency Response to Comment 60

The Department does not concur with this comment. This Rule has been purposefully worded so as to reference all applicable laws which currently exist or may exist in the future.

Comment 61

Rule 0780-1-54-.10 Rates and Rate Reporting

It was commented that pools should have the authority to set their rates and not have to change them until the pool's renewal because the amount of premium that is needed for the year is set by the pool's actuary at the beginning of the pool year and is based on the currently effective loss costs. It was further commented that in North Carolina and Mississippi, insurance companies and pools may elect to base their rates on any previously approved loss cost filing and may elect to retain those rates indefinitely, and that any new member that elects to join a pool mid-term compared the rates and benefits of the program against those available from the rest of the insurance marketplace.

Agency Response to Comment 61

The Department does not concur in this recommendation. The General Assembly has adopted the current loss cost method for pricing workers' compensation insurance, and in so doing has evidenced its intent for the Commissioner's adopted loss cost to apply to all employers regardless of the type of entity in which they obtain such insurance. As such, pools must comply with any order affecting the loss cost adopted by the Commissioner pursuant to Tenn. Code Ann. § 56-5-320.

Comment 62

Rule 0780-1-54-.10 Rates and Rate Reporting

It was commented that this Rule be amended to allow a pool to subject all members of the pool to the same loss cost multiplier which was in effect on January 1st of each year including those members who joined the pool midway through the fund year.

Agency Response to Comment 62

The Department does not concur in this recommendation. The General Assembly has adopted the current loss cost method for pricing workers' compensation insurance, and in so doing has evidenced its intent for the Commissioner's adopted loss cost to apply to all employers regardless of the type of entity in which they obtain such insurance. As such, pools must comply with any order affecting the loss cost adopted by the Commissioner pursuant to Tenn. Code Ann. § 56-5-320.

Comment 63

Rule 0780-1-54-.10 Rates and Rate Reporting

It was commented that the Department should have the authority to allow the pools to use the same advisory prospective loss cost that is on effect the first day of the pool's fiscal year for the entire pool year, on a case-by-case basis if the Department finds that this method would not effect the viability of the pool and that such method is actuarially sound while taking into account the pool's surplus position and the individual participants' joint and several liability.

Agency Response to Comment 63

The Department does not concur in this recommendation. The General Assembly has adopted the current loss cost method for pricing workers' compensation insurance, and in so doing has evidenced its intent for the Commissioner's adopted loss cost to apply to all employers regardless of the type of entity in which they obtain such insurance. As such, pools must comply with any order affecting the loss cost adopted by the Commissioner pursuant to Tenn. Code Ann. § 56-5-320.

Comment 64

Rule 0780-1-54-.10 Rates and Reporting of Rates

It was commented that Paragraph (5) of this Rule should be clarified to state whether it is intending to address payroll audits or not. It was further commented that if the purpose of the Paragraph of this Rule is to reference payroll audits, then the Department should clarify the role of the Department's approval. It was also commented that payroll audit companies do not issue formal consolidated reports. It was also commented that if the purpose of this section was to require a new and separate audit requirement, then the pools would incur significantly increased audit costs.

Agency Response to Comment 64

Paragraph (5) of this Rule is intended to allow the Commissioner to require a pool to be audited to verify proper classifications, experience ratings, payroll and rates, and conformance with standards in rules of the designated rate service organization. The Departments wishes to note that this authority exists in the current rules.

Comment 65

Rule 0780-1-54-.10 Rates and Reporting of Rates

It was commented that Paragraph (6) should be clarified to specify the form by which the pool participant is to be notified of the pool's appeal method.

Agency Response to Comment 65

The Department recommends that each pool set forth its method of appeal in its bylaws.

Comment 66

Rule 0780-1-54-.10 Rates and Reporting of Rates

It was commented that the wording in Paragraph (7) of this Rule should be changed from "its members" to "the member".

Agency Response to Comment 66

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 67

Rule 0780-1-54-.11 Premiums and Reserves

It was commented that Paragraph (3) of this Rule which allows the Department to increase the minimum requirement for a pool's reserves is similar to what is required for insurance companies in Tenn. Code Ann. § 56-2-120. It was commented that the risk based capital law that is found in Tenn. Code Ann. § 56-46-101, *et seq.* has superseded this requirement. It was commented that Paragraph (3) of this Rule may be unnecessary for the following reasons:

1. Since pools operate on a fund year basis, any available surplus is due to the pool's member employers. The amounts and timing of refunds is already addressed in the both the current rules and the proposed rules.
2. Individual pool participant are jointly and severally liable. If there is a shortfall the member employers are assessable for the difference. This is in direct contrast to insurance company insolvencies. If an insurance company becomes insolvent, the taxpayers of the state are liable to make up the difference (through a guaranty pool feature). For pools, the participating employers must make up the difference. Thus, the additional surplus rule as proposed may not be needed.
3. There is no surplus requirement under either the current rules or the proposed rules. As there is no surplus requirement, there is little need for a provision to raise the minimum amount of surplus required.

Agency Response to Comment 67

The Department does not concur with this comment. The Department has amended the Rule to replace the word "surplus" in the Rule, with the word "reserve".

Comment 68

Rule 0780-1-54-.11 Premium and Reserves

It was commented that Paragraph (3) of this Rule is redundant and unnecessary since a departmentally approved actuary must certify a pool's adequacy. It was also commented that the impact of this Paragraph would markedly increase the administrative burden on the Commissioner and Department staff to make a similar determination.

Agency Response to Comment 68

The Department does not concur with this comment.

Comment 69

Rule 0780-1-54-.12 Taxes and Delinquencies

It was commented that some pools cannot comply with the June 30th deadline for the payment of premium taxes because some pools operate on a fiscal year that is different from a calendar year.

Agency Response to Comment 69

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 70

Rule 0780-1-54-.12 Taxes and Delinquencies

It was commented that the Department should clarify what is meant by “barring a pool from transacting business”.

Agency Response to Comment 70

The intent of Paragraph (4) of this Rule is to prohibit a pool that is more than sixty (60) days delinquent in the payment of its tax plus any applicable penalty and interest from writing or renewing any policy of insurance in this State.

Comment 71

Rule 0780-1-54-.12 Taxes and Delinquencies

It was commented that revoking a pool’s certificate of authority for its failure to pay taxes could harm injured workers if the claims are not paid.

Agency Response to Comment 71

The revocation of a pool’s certificate of authority does not relieve it from handling all claims and providing for the orderly run-off of the pool’s business.

Comment 72

Rule 0780-1-54-.12 Taxes and Delinquencies

It was commented that Paragraph (5) of this Rule appears to conflict with Paragraph (3) of this Rule which allows for a sixty (60) day extension.

Agency Response to Comment 72

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 73

Rule 0780-1-54-.13 Investments

It was commented that the pools are opposed to any form of statutory accounting that was referenced in Paragraph (1) of this Rule.

Agency Response to Comment 73

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 74

Rule 0780-1-54-.13 Investments

It was commented that the requirement that the pools maintain its investments in accounts that are fully insured should be amended because this would require pools to have hundred of bank accounts across the state.

Agency Response to Comment 74

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment.

Comment 75

Rule 0780-1-54-.14 Information to Members

It was commented that the word “their” should be inserted between the words “all” and “pertinent”. It was also commented that the Department should clarify what is meant by “pertinent information.”

Agency Response to Comment 75

The Department does not concur with this comment. The language for the commented on portion of this Rule is taken directly from Tenn. Code Ann. § 56-5-309.

Comment 76

Rule 0780-1-54-.15 Refunds and Dividends

It was commented that the pools wish Paragraph (4) of this Rule to more clearly define what guidelines and standards the Department would use to determine whether or not to approve or disapprove a dividend request.

Agency Response to Comment 76

The purpose of this requirement is to give the Commissioner and the pool the flexibility of evaluating each pool on a case by case basis since each pool has a slightly different operational structure. If the discretionary language is removed, the flexibility is also removed and for that reason, the Department will not accept this comment.

Comment 77

Rule 0780-1-54-.16 Sponsoring Associations

It was commented that Paragraph (1) of this Rule appears to go farther than what the Legislature intended relative to the Board’s responsibilities by requiring the sponsoring association to file a certified copy of the Board minutes “evidencing” that the Board has reviewed the actions of the pool. It was suggested that this Paragraph be amended to read as follows:

Each pool shall annually file with the Commissioner a certified copy of the board minutes of its sponsoring association. These minutes or portions of minutes must demonstrate that the sponsoring association’s board of directors has reviewed the actions of the pool and deemed that the pool is operating in compliance with the sponsoring association’s constitution, by-laws, and procedures and that the pool complies with applicable state

statutes and regulations. In making such a statement, the board of the pool's sponsoring association may rely in good faith on the opinions of the outside professionals that the pool meets such requirements.

Agency Response to Comment 77

The Department has amended this Rule to more accurately reflect the language of the statute and therefore, does not concur with this comment.

Comment 78

Rule 0780-1-54-.16 Sponsoring Associations

It was requested that Paragraph (2) of this Rule be amended to allow the sponsoring association to receive a royalty fee or other fee to be based on a percentage of premium.

Agency Response to Comment 78

The Department does not believe that it was the General Assembly's intent for sponsoring association to be able to profit off of workers' compensation self-insurance pools in which they sponsor. Such pools are joint and several in nature and exist for the sole purpose of allowing its members an alternative to purchasing insurance on the commercial market. The Department is not against a sponsoring association receiving some remuneration for services performed on behalf of its pool. However, the Department does believe that the amount of any such remuneration should be linked to the fair value of such services instead of being based on a percentage of the pool's premium.

Comment 79

Rule 0780-1-54-.16 Sponsoring Associations

It was commented that the Rule's creation of an ability to approve or disapprove royalty fee agreements entered into between the sponsoring association and the pool is overly broad because the Rule does not provide a basis on which the Department could or would disapprove a fee arrangement. It was suggested that this Rule be amended so as to give the Commissioner the authority to disapprove and disallow the use of a fee arrangement if that arrangement violates any provision of state statute or the rules of the Department, or if the Commissioner determines that the fee arrangement adversely affects the solvency of the pool.

Agency Response to Comment 79

The Department does not believe that it was the General Assembly's intent for sponsoring association to be able to profit off of workers' compensation self-insurance pools in which they sponsor. Such pools are joint and several in nature and exist for the sole purpose of allowing its members an alternative to purchasing insurance on the commercial market. The Department is not against a sponsoring association receiving some remuneration for services performed on behalf of its pool. However, the Department does believe that the amount of any such remuneration should be linked to the fair value of such services instead of being based on a percentage of the pool's premium.

Comment 80

Rule 0780-1-54-.17 Insurance Producer License Required

It was commented that this Rule should be clarified to state that the sponsoring association and administrator can promote member participation in a pool, answer member inquiries, and not be held to be "soliciting" as the term is statutorily defined in of Title 56, Chapter 6, Part 1.

Agency Response to Comment 80

The Department concurs with this comment and the proposed rules have been amended in order to incorporate the changes sought by this comment. The Rule has also been amended to state that such persons may not receive a commission for their role in soliciting new members.

Comment 81

Rule 0780-1-54-.20 Examinations and Investigations

It was commented that the Department should clarify the intent of Paragraph (2) of this Rule and questioned whether this language is necessary given the Department's authority.

Agency Response to Comment 81

The purpose of Paragraph (2) of this Rule is to provide the Commissioner the appropriate authority to investigate the affairs of any person acting as or associated or affiliated with a pool.

Comment 82

Rule 0780-1-54-.22 Suspension or Revocation of Certificate of Authority

It was commented that Subparagraph (1)(a) of this Rule appears to be very broad in light of the Commissioner's powers regarding the Commissioner's authority to suspend or revoke a pool's certificate for a finding that the pool is in a hazardous financial condition.

Agency Response to Comment 82

The purpose of this requirement is to give the Commissioner and the pool the flexibility of evaluating each pool on a case by case basis since each pool has a slightly different operational structure. If the discretionary language is removed, the flexibility is also removed and for that reason, the Department will not accept this comment.

Comment 83

Rule 0780-1-54-.22 Suspension or Revocation of Certificate of Authority

It was requested that the Department clearly define the term "hazardous financial condition".

Agency Response to Comment 83

The purpose of this requirement is to give the Commissioner and the pool the flexibility of evaluating each pool on a case by case basis since each pool has a slightly different operational structure. If the discretionary language is removed, the flexibility is also removed and for that reason, the Department will not accept this comment.

Comment 84

Rule 0780-1-54-.22 Suspension or Revocation of Certificate of Authority

It was commented that Subparagraph (1)(f) of this Rule should include a provision for an applicant to apply to the Department for a waiver as allowed for under federal law.

Agency Response to Comment 84

The Department does not concur with this comment. Subparagraph (1)(f) of this Rule should be read as only giving the Commissioner the authority to suspend or revoke a certificate of authority. The Department will consider whether action under this subparagraph is appropriate on a case by case basis.

Comment 85

Rule 0780-1-54-.22 Suspension or Revocation of Certificate of Authority

It was commented that the Department should clearly define what constitutes an administrator being “sufficiently qualified” pursuant to Subparagraph (1)(h) of this Rule.

Agency Response to Comment 85

The purpose of this requirement is to give the Commissioner and the pool the flexibility of evaluating each pool on a case by case basis since each pool has a slightly different operational structure. If the discretionary language is removed, the flexibility is also removed and for that reason, the Department will not accept this comment.

Comment 86

Rule 0780-1-54-.22 Suspension or Revocation of Certificate of Authority

It was commented that Subparagraph (1)(j) of this Rule be amended read a “significant misrepresentation”.

Agency Response to Comment 86

The Department does not concur with this comment.

Comment 87

Rule 0780-1-54-.22 Suspension or Revocation of Certificate of Authority

It was commented that Subparagraph (1)(k) of this Rule’s language of “refuses to pay over upon proper demand any monies that belong to a member, etc” leaves a great deal of interpretation by third parties and could result in unnecessary and perhaps unfounded disputes and/or litigation.

Agency Response to Comment 87

The Department concurs with this comment and the proposed rules have been amended to specify that there is not a private cause of action created by this Rule.

Comment 88

Rule 0780-1-54-.22 Suspension or Revocation of Certificate of Authority

It was commented that the penalty amount in Paragraph (2) of this Rule be amended to be the same penalty imposed against insurance companies.

Agency Response to Comment 88

The Department does not concur with this comment.

Comment 89

Rule 0780-1-54-.24 Assessments

It was commented that the Department should clearly define what constitutes “notice of a deficiency to the pool.”

Agency Response to Comment 89

The Department does not concur with this comment. It is anticipated that pools will learn of a deficiency from either their audit or through any other financial information supplied to the pool. Upon receipt of such information, a pool must comply with the assessment requirement of this Rule.

Comment 90

Rule 0780-1-54-.24 Assessments

It was commented that Paragraph (4) of this Rule relating to the Commissioner’s ability to treat any pool that has a deficiency as in a hazardous financial condition should be deleted.

Agency Response to Comment 90

The Department does not concur with this comment.

Comment 91

Rule 0780-1-54-.24 Assessments

It was commented that Paragraph (5) of this Rule relating to the Department's ability to treat any pool that fails to comply with an order of the Commissioner under this Rule to be insolvent should be deleted.

Agency Response to Comment 91

The Department does not concur with this comment.

Comment 92

Rule 0780-1-54-.24 Termination of Certificate of Authority

It was commented that the language "as determined by Chancery Court" be inserted at the end of Paragraph (6) of this Rule allowing for the imposition of the reasonable cost of supervision, liquidation, or rehabilitation.

Agency Response to Comment 92

The Department does not concur with this comment.

Comment 93

General Comment

It was commented that there is no provision for a transitory period to allow existing pools to come into compliance with the rules once the final version of the rules take effect. It was suggested that the Department allow the existing pools a period of one (1) year to come into compliance. It was suggested that the rules be amended to reflect the following:

These rules shall become effective upon being finalized by the Office of the Secretary of State under the Uniform Administrative Procedures Act. Any self-insured workers' compensation pool subject to these rules shall be fully compliant with them not later than one year after the effective date of the rules.

Agency Response to Comment 93

The Department does not believe that these rules effect any significant change to the current requirements of pools as it relates to the pool's daily operations. It is the Department's position that these rules primarily affect the process and procedures of the Department's regulation of the pools. As such, the Department does not believe that any additional time beyond what is currently provided for by law is necessary.