

Article 5.

Individual Employers.

**§ 97-165. Definitions.**

As used in this Article:

- (1) "Act" means the Workers' Compensation Act established in Article 1 of this Chapter.
- (1a) "Affiliate of" or "person affiliated with" a specific person means a person that indirectly through one or more intermediaries or directly controls, is controlled by, or is under common control with the person specified.
- (1b) "Association Aggregate Security System" means the security system established pursuant to G.S. 97-133 whereby individual self-insurers collectively secure their aggregate self-insured workers' compensation liabilities under the Act through the North Carolina Self-Insurance Security Association.
- (2) "Certified audit" means an audit on which a certified public accountant expresses his or her professional opinion that the accompanying statements fairly present the financial position of the self-insurer or the guarantor, in conformity with accounting principles generally accepted in the United States.
- (3) "Certified public accountant" or "CPA" means a CPA who is in good standing with the American Institute of Certified Public Accountants and in all states in which the CPA is licensed to practice. A CPA shall be recognized as independent as long as the CPA conforms to the standards of the profession, as contained in the Code of Professional Ethics of the American Institute of Certified Public Accountants and Rules and Regulations and Code of Ethics and Rules of Professional Conduct of the North Carolina State Board of Certified Public Accountant Examiners, or similar code. The Commissioner may hold a hearing to determine whether a CPA is independent and, considering the evidence presented, may rule that the CPA is not independent for purposes of expressing an opinion on the GAAP financial statement and require the self-insurer or the guarantor to replace the CPA with another whose relationship with the self-insurer or the guarantor is independent within the meaning of this definition.
- (4) "Commissioner" means the Commissioner of Insurance.
- (4a) "Control", "controlling", "controlled by", and "under common control with" mean the direct or indirect possession of the power to direct or cause the direction of the management and policies of a person through ownership of or through proxies for voting of greater than fifty percent (50%) of the voting securities, or in the case of a not-for-profit entity,

- the power to direct or cause the direction of the management and policies of the entity.
- (5) "Corporate surety" means an insurance company authorized by the Commissioner to write surety business in this State.
  - (6) "GAAP financial statement" means a financial statement as defined by accounting principles generally accepted in the United States.
  - (6a) "Guarantor" means a person within the same holding company system who controls the applicant, whose financial statement is used by the applicant to become a self-insurer under the Act, and who has guaranteed the payment of the self-insurer's liability under the Act.
  - (7) "Hazardous financial condition" means that, based on its present or reasonably anticipated financial condition, a self-insurer or guarantor is insolvent or, although not yet financially impaired or insolvent, is unlikely to be able to meet its obligations with respect to known claims and reasonably anticipated claims or to pay other obligations in the normal course of business.
  - (7a) "Holding company system" means an entity comprising two or more affiliated persons.
  - (8) "Management" means those persons who are authorized to direct or control the operations of a self-insurer.
  - (8a) "Person" means an individual, corporation, partnership, limited liability company, association, joint stock company, trust, unincorporated organization, or any similar entity or any combination of the foregoing acting in concert.
  - (9) "Qualified actuary" means a member in good standing of the Casualty Actuarial Society or a member in good standing of the American Academy of Actuaries, who has been approved as qualified for signing casualty loss reserve opinions by the Casualty Practice Council of the American Academy of Actuaries, and is in compliance with G.S. 58-2-171.
  - (10) "Self-insurer" means an individual self-insurer as defined by G.S. 97-130(5b).
  - (11) "Subsidiary of" a specific person means an affiliate controlled by such person indirectly through one or more intermediaries or an affiliate directly controlled by such person. (1997-362, s. 4; 1999-132, s. 13.5; 2004-199, s. 20(h); 2005-400, s. 9.)

**§ 97-170. License applications; required information.**

(a) No employer shall self-insure its workers' compensation liabilities under the Act unless it is licensed by the Commissioner under this Article. This subsection does not apply to an employer authorized to self-insure its workers' compensation liabilities under the Act prior to December 1, 1997, whose authority to self-insure its workers' compensation liabilities under the Act has not terminated after that date.

(b) An applicant for a license as a self-insurer shall file with the Commissioner the information required by subsection (d) of this section on a form prescribed by the Commissioner at least 90 days before the proposed licensing date. No application is complete until the Commissioner has received all required information. A copy of the application must also be filed with the North Carolina Self-Insurance Security Association at least 90 days before the proposed licensing date.

(c) Only an applicant whose total fixed assets amount to five hundred thousand dollars (\$500,000) or more may apply for a license. In judging the applicant's financial strength and liquidity relative to its ability to comply with the Act, the Commissioner shall consider all of the following relative to the applicant:

- (1) Organizational structure and management.
- (2) Financial strength.
- (3) Source and reliability of financial information.
- (4) Risks to be retained.
- (5) Workers' compensation loss history.
- (6) Number of employees.
- (7) Claims administration.
- (8) Excess insurance.
- (9) Access to excess insurance.

(d) The license application shall be comprised of the following information:

- (1) Applicant name; organizational structure of the applicant, including any controlling entity, subsidiaries, or affiliates; location of principal office; contact person; organization date; type of operations within this State; management background; and addresses of all plants or offices in this State.
- (2) Certified audited GAAP financial statements prepared by a CPA for the two most recent years. The financial statement presentation shall facilitate application of ratio and trend analysis.
- (3) Evidence of the insurance required by G.S. 97-190.
- (4) Repealed by Session Laws 1999-132, s. 13.7, effective June 4, 1999.
- (5) For applicants with 20 or more full-time employees, a certificate or other evidence of safety inspection, satisfactory to the Commissioner, that certifies that all safety requirements of the Department of Labor have been met.
- (6) Summary of workers' compensation benefits paid for the last three calendar years and the total liability for all open claims within 30 days or some other period acceptable to the Commissioner not to exceed 90 days, before the filing of the application.
- (7) Summary, by risk classification, of annual payroll and number of employees within the State.
- (8) Repealed by Session Laws 2005-400, s. 10, effective January 1, 2006.
- (9) Proof of compliance with the claims administration provisions of Article 47 of Chapter 58 of the General Statutes.

(10) A letter of approval for membership by the North Carolina Self-Insurance Security Association.

(e) Every applicant shall execute and file with the Commissioner an agreement, as part of the application, in which the applicant agrees to participate in the Association Aggregate Security System, or if excluded from the Association Aggregate Security System, to deposit with the Commissioner pursuant to G.S. 97-185 cash, acceptable securities, an irrevocable letter of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner, or a surety bond issued by a corporate surety, or a combination thereof, that will guarantee the applicant's compliance with this Article and the Act. (1997-362, s. 4; 1999-132, ss. 13.6, 13.7; 2003-212, s. 25; 2005-400, s. 10.)

**§ 97-175. License.**

(a) After the review of the application and all supporting materials, the Commissioner shall either grant or deny a license. If a license is denied, the Commissioner shall notify the applicant of the denial and inform the applicant of the deficiencies that constitute the basis for denial.

(b) If the deficiencies are resolved within 60 days after the Commissioner's notice of denial, the applicant shall be granted a license. The applicant may be granted additional time to remedy the deficiencies in its application. A request for an extension of time shall be made in writing by the applicant within 30 days after notice of denial by the Commissioner. If the requirements of this Article have not been met, the application shall be withdrawn or denied. (1997-362, s. 4.)

**§ 97-177. License covering applicant and any subsidiary or applicant relying on a guarantor; procedure; requirements.**

(a) The Commissioner may, in the Commissioner's discretion, upon request by an applicant, issue a license to an applicant or to an applicant and one or more of its subsidiaries if all of the following requirements are satisfied:

- (1) The applicant or a guarantor of the applicant executes a guaranty agreement, in a form prescribed by the Commissioner, for the payment of all workers' compensation liabilities covered under the Act. For any applicant or guarantor that is a corporation, there shall be submitted, along with the guaranty agreement, a board of directors' resolution from the respective corporation authorizing the guaranty of the liabilities of the subsidiary company or companies and granting signature authority to each person or officer executing the agreement.
- (2) The applicant or guarantor files a statement with the Commissioner that lists the percentage of ownership of voting securities or proxies representing voting securities owned or held by the applicant or guarantor for each subsidiary, or in the case of a not-for-profit entity, documentation acceptable to the Commissioner evidencing control.
- (3) The applicant and its guarantor or the applicant and its subsidiaries, whichever applies, satisfy the requirements of G.S. 97-170(c).

(4) All other applicable requirements for licensure under the Act are satisfied.

(b) A license issued by the Commissioner pursuant to this section shall include the name of the applicant, the name of each licensed subsidiary, and the date of issuance for each licensed subsidiary.

(c) If a self-insurer requests to add a subsidiary to its license, the Commissioner shall review the request in accordance with this section. Upon approval, the Commissioner shall issue to the self-insurer a new license that includes the newly licensed subsidiary and the date of license issuance for the newly licensed subsidiary, and the self-insurer shall return the original license to the Commissioner.

(d) A self-insurer shall neither include nor delete a subsidiary from its license without the Commissioner's prior written approval.

(e) If a controlling relationship or guaranty agreement terminates, the self-insurer shall retain all liabilities under the Act that were incurred by the self-insurer during the period of self-insurance and shall account for all such liabilities until discharged, as evidenced by reports filed with the Commissioner. Termination of a guaranty agreement does not affect the guarantor's liability for payment of liabilities arising prior to termination of the agreement. (2005-400, s. 11.)

#### **§ 97-180. Reporting and records.**

(a) Every self-insurer shall submit, within 120 days after the end of its fiscal year, a certified audited GAAP financial statement, prepared by a CPA, for that fiscal year. The financial statement presentation shall facilitate the application of ratio and trend analysis. If the self-insurer was issued a license pursuant to G.S. 97-177, the financial statement required under this subsection shall be that of the guarantor.

(b) Every self-insurer shall submit within 120 days after the end of its fiscal year a report from a qualified actuary setting forth an opinion certifying the loss and loss adjustment expense reserves for workers' compensation obligations in North Carolina. The report shall show liabilities, excess insurance carrier and other qualifying credits, if any, and net retained workers' compensation liabilities.

(c) Every self-insurer shall submit within 120 days after the end of its fiscal year a report in the form of a sworn statement prescribed by the Commissioner, setting forth the total workers' compensation benefits paid in the previous fiscal year, and the total outstanding workers' compensation liabilities for each loss year, recorded at the close of its fiscal year for the net retained liability.

(d) Upon the request of the Commissioner, every self-insurer shall submit a report of its annual payroll information. The report shall summarize payroll, by annual amount paid, and the number of employees, by classification, using the rules, classifications, and rates in the most recently approved Workers' Compensation and Employers' Liability Insurance Manual governing the audits of payrolls and the adjustments of premiums. Every self-insurer shall maintain true and accurate payroll records. These payroll records shall be maintained to allow for verification of the completeness and accuracy of the annual payroll report.

(e) Every self-insurer shall report promptly to the Commissioner changes in the name or address of the self-insurer or guarantor; significant changes in the financial condition of the self-insurer, guarantor, or any affiliate, including bankruptcy filings; and changes in its organizational structure, including its subsidiaries and affiliates. Any change shall be reported in writing to the Commissioner within 10 days after the effective date of the change. Upon request by the Commissioner, a self-insurer shall provide the Commissioner copies of documents or information deemed necessary to determine whether any change has affected the privilege of the employer to self-insure. (1997-362, s. 4; 1999-132, ss. 13.8, 13.9; 2005-400, s. 12.)

**§ 97-185. Deposits; surety bonds; letters of credit.**

(a) Repealed by Session Laws 2005-400, s. 13, effective January 1, 2006.

(a1) All individual self-insurers as defined in G.S. 97-130(5b) shall participate in the Association Aggregate Security System established under G.S. 97-131 unless excluded by the Board of Directors of the North Carolina Self-Insurance Security Association. The Board of Directors of the North Carolina Self-Insurance Security Association shall exclude all of the following from the Association Aggregate Security System:

- (1) Individual self-insurers whose licenses have previously been revoked by the Commissioner.
- (2) Individual self-insurers with a debt rating as established by Standard & Poor's Rating Service or by Moody's Investor Service, below the minimum Standard & Poor's and Moody's ratings established in the written plan for the Association Aggregate Security System submitted by the Association and approved by the Commissioner under G.S. 97-133(a)(2a).
- (3) Individual self-insurers that have defaulted on the payment of its self-insured workers' compensation liabilities from participation in the Association Aggregate Security System.

The Board of Directors of the North Carolina Self-Insurance Security Association shall notify the Commissioner of the individual self-insurers that are excluded from participating in the Association Aggregate Security System.

(b) Repealed by Session Laws 2003-115, s. 3, effective January 1, 2004.

(b1) Repealed by Session Laws 2005-400, s. 13, effective January 1, 2006.

(b2) An individual self-insurer that is excluded from participation in the Association Aggregate Security System, including individual self-insurers that are granted a license to self-insure after the North Carolina Self-Insurance Security Association annually implements the Association Aggregate Security System, shall deposit with the Commissioner an amount not less than one hundred percent (100%) of the individual self-insurer's total undiscounted outstanding claims liability per the most recent report from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars (\$500,000), or such greater amount as the Commissioner prescribes

based on, but not limited to, the financial condition of the individual self-insurer and the risk retained by the individual self-insurer.

(b3) During any period of time that no Association Aggregate Security System is in effect, individual self-insurers with a debt rating of BBB or better from Standard & Poor's Rating Service, a division of McGraw Hill, Inc., or an equivalent rating from another national rating agency shall deposit with the Commissioner an amount not less than twenty-five percent (25%) of the individual self-insurer's total undiscounted outstanding claims liability per the most recent report from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars (\$500,000). An individual self-insurer licensed pursuant to G.S. 97-177 may utilize the debt rating of its guarantor for the purpose of establishing the application of this subsection. The Commissioner shall consider and may, in the Commissioner's discretion, increase or reduce the deposit to a greater or lesser percentage of the individual self-insurer's claims liability based on the financial strength of the individual self-insurer and other financial information submitted by the individual self-insurer. All other individual self-insurers shall deposit with the Commissioner an amount not less than one hundred percent (100%) of the individual self-insurer's total undiscounted outstanding claims liability per the most recent report from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars (\$500,000), or such greater amount as the Commissioner prescribes based on, but not limited to, the financial condition of the individual self-insurer and the risk retained by the individual self-insurer.

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall be comprised of one or more of the following:

- (1) Interest-bearing bonds of the United States of America.
- (2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.
- (3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.
- (4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety. A surety bond deposited pursuant to this subsection shall require that the surety reimburse the Commissioner, or his successors, assigns, or transferees, for any costs incurred in the collection of the proceeds of the surety bond, including reasonable attorneys' fees, and any costs incurred in administering the insolvent self-insurer's workers' compensation claims.
- (4a) Irrevocable letters of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner. An irrevocable letter of credit deposited pursuant to this subsection shall require that the bank reimburse the Commissioner, or his successors, assigns, or transferees for any costs incurred in the collection of the proceeds of the letter of credit, including reasonable attorneys' fees.
- (4b) The reimbursement of attorneys' fees and collections cost provided for in subdivisions (4) and (4a) of this subsection shall be no greater than

fifteen percent (15%) of the penal amount of the bond and shall not come from the proceeds of the bond or the letter of credit but shall be in addition to the proceeds of the bond or the letter of credit.

(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If the market value is less than the face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's or guarantor's financial condition, the amount by which market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer or guarantor is deemed by the Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. In the case of a letter of credit, the Commissioner may draw the full amount of a letter of credit if the letter of credit is not renewed within 90 days prior to its expiration or at any time that the bank issuing the letter of credit is no longer acceptable to the Commissioner. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer or guarantor is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Pursuant to the provisions of this section and with the approval of the Commissioner, deposits held by the Commissioner may be replaced with other acceptable forms of deposit in amount determined by the Commissioner. Any deposit to be replaced with another form of deposit shall not be released until the approved replacement deposit is received by the Commissioner.

(h) Any self-insurer that ceases to self-insure, whether by voluntary termination or by revocation of license, shall continue to secure and be liable for its obligations under the Act and shall continue to report to the Commissioner pursuant to G.S. 97-180. Upon the request of the Commissioner, a self-insurer that ceases to self-insure shall submit filings, as prescribed in G.S. 97-180, to determine whether the deposit is sufficient to satisfy those workers' compensation obligations incurred during the period that the self-insurer was licensed as a self-insurer. The Commissioner may require an increase in the deposit amount or may grant a reduction in the deposit amount to ensure that the deposit is sufficient to cover all existing and future obligations incurred by the self-insurer while subject to the provisions of the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement. (1997-362, s. 4; 2003-115, ss. 3, 4, 5; 2005-400, s. 13.)

### **§ 97-190. Excess insurance.**

(a) Every self-insurer, as a prerequisite for licensure under this Article, shall maintain specific and aggregate excess loss coverage through an insurance policy. A self-insurer shall maintain limits and retentions commensurate with its risk. A self-insurer's retention shall be the lowest retention suitable for the self-insurer's exposures and level of annual premium. The Commissioner may require different levels, or waive the requirement, of specific and aggregate excess loss coverage consistent with the market availability of excess loss coverage, the self-insurer's claims experience, and the self-insurer's or guarantor's financial condition.

(b) An excess insurance policy required by this section shall be issued by either an insurance company licensed in this State or an eligible surplus lines insurer as defined in G.S. 58-21-10 and shall:

- (1) Provide for at least 30 days' written notice of cancellation by registered or certified mail, return receipt requested, to the self-insurer and to the Commissioner.
- (2) Be renewable automatically at its expiration, except upon 30 days' written notice of nonrenewal by certified mail, return receipt requested, to the self-insurer and to the Commissioner.

(c) Every self-insurer shall provide to the Commissioner evidence of coverage and any amendments within 30 days after their effective dates. Every self-insurer shall, at the request of the Commissioner, furnish copies of its excess insurance policies and amendments. (1997-362, s. 4; 2005-400, s. 14.)

**§ 97-195. Revocation, suspension or restriction of license.**

(a) Repealed by Session Laws 2005-400, s. 15, effective January 1, 2006.

(a1) The Commissioner may, upon at least 45 days notice and opportunity for a hearing, revoke, suspend, or restrict the license of a self-insurer if any of the following apply:

- (1) The self-insurer fails or refuses to comply with any law, order, or rule applicable to the self-insurer.
- (2) There is a determination of insolvency by a court of competent jurisdiction.
- (3) The self-insurer is in a hazardous financial condition.
- (4) The self-insurer has experienced a material loss or deteriorating operating trends, or has reported a deficit financial position.
- (5) Any affiliate or subsidiary is insolvent, threatened with insolvency, or delinquent in payment of its monetary or any other obligation.
- (6) The self-insurer has failed to pay premium taxes pursuant to Article 8B of Chapter 105 of the General Statutes.
- (7) Contingent liabilities, pledges, or guaranties that either individually or collectively involve a total amount that in the Commissioner's opinion may affect a self-insurer's solvency.
- (8) The management of a self-insurer has failed to respond to the Commissioner's inquiries about the condition of the self-insurer or has

furnished false and misleading information in response to an inquiry by the Commissioner.

- (9) The management of a self-insurer has filed any false or misleading sworn financial statement, has released a false or misleading financial statement to a lending institution or to the general public, or has made a false or misleading entry or omitted an entry of material amount in the filed financial information.
- (10) The self-insurer has experienced, or will experience in the foreseeable future, cash flow or liquidity problems.
- (11) The self-insurer has failed to make proper and timely payment of claims, as required by this Article.
- (12) Failure to pay any North Carolina Self-Insurance Security Association assessments made pursuant to G.S. 97-133.
- (13) Failure to participate in the Association Aggregate Security System or, if excluded from participation in the Association Aggregate Security System, failure to provide and maintain the deposit required by G.S. 97-185.

(b) Repealed by Session Laws 2005-400, s. 15, effective January 1, 2006.

(c) Any self-insurer subject to license revocation, suspension, or restriction under subsection (a1) of this section may request an administrative hearing before the Commissioner to review that order. If a hearing is requested, a notice of hearing shall be served, and the notice shall state the time and place of hearing and the conduct, condition, or ground on which the Commissioner based the order. Unless mutually agreed upon between the Commissioner and the self-insurer, the hearing shall occur not less than 10 days nor more than 30 days after notice is served and shall be either in Wake County or in some other place designated by the Commissioner. The Commissioner shall hold all hearings under this section privately unless the self-insurer requests a public hearing, in which case the hearing shall be public. The request for a hearing shall not stay the effect of the order. (1997-362, s. 4; 2003-221, s. 15; 2005-400, s. 15.)

#### **§ 97-196. Civil penalties or restitution for violations; administrative procedure.**

(a) Whenever the Commissioner has reason to believe that a self-insurer has violated any of the provisions of this Article, and the violation subjects the license of the self-insurer to suspension or revocation, the Commissioner may, after notice and opportunity for a hearing, proceed under the appropriate subsections of this section.

(b) If the Commissioner finds a violation of this Article, the Commissioner may, in addition to or instead of suspending or revoking the license, order the payment or a monetary penalty as provided in subsection (c) of this section or petition the Superior Court of Wake County for an order directing payment of restitution as provided in subsection (d) of this section, or both. Each day during which a violation occurs constitutes a separate violation.

(c) If the Commissioner orders the payment of a monetary penalty pursuant to subsection (b) of this section, the penalty shall not be less than one hundred dollars

(\$100.00) nor more than one thousand dollars (\$1,000). In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation, the amount of money that inured to the benefit of the violator as a result of the violation, whether the violation was committed willfully, and the prior record of the violator in complying or failing to comply with laws, rules, or orders applicable to the violator. The clear proceeds of the penalty shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Payment of the civil penalty under this section shall be in addition to payment of any other penalty for a violation of the criminal laws of this State.

(d) Upon petition of the Commissioner, the court may order the self-insurer who committed a violation specified in subsection (b) of this section to make restitution in an amount that would make whole any person harmed by the violation. The petition may be made at any time, and the petition may be made in any appeal of the Commissioner's order.

(e) Restitution to any State agency for extraordinary administrative expenses incurred in the investigation and hearing of the violation may also be ordered by the court in such amount that would reimburse the agency for the expenses.

(f) Nothing in this section prevents the Commissioner from negotiating a mutually acceptable agreement with any self-insurer as to the status of the self-insurer's license or as to any civil penalty or restitution.

(g) Unless otherwise specifically provided for, all administrative proceedings under this Article are governed by Chapter 150B of the General Statutes. Appeals of the Commissioner's orders under this section shall be governed by G.S. 58-2-75. (2005-400, s. 16.)

#### **§ 97-200. Claims administration.**

(a) A self-insurer shall not utilize any claims adjuster unless the adjuster is licensed under G.S. 58-33-25.

(b) Every self-insurer shall comply with the provisions of Article 47 of Chapter 58 of the General Statutes that are related to claims administration. (1997-362, s. 4.)