

**Chapter 114 Self-Insurance**

**Amend 28 TAC §§114.1 -114.15**

**New 28 TAC § 114.16**

**1. INTRODUCTION.** The Texas Department of Insurance, Division of Workers' Compensation (division) proposes amendments to 28 Texas Administrative Code (TAC) §§114.1 - 114.15 and proposes new 28 TAC §114.16. The proposed changes implement House Bill (HB) 1989 of the 85th Legislative Session. Amendments also include several non-substantive changes to reflect current regulatory structure and agency drafting style.

**2. EXPLANATION.**

Under the Texas Workers' Compensation Act (Act), Certified Self-Insureds (CSIs) are considered workers' compensation insurance carriers and are obligated to provide the same workers' compensation benefits as those that insurance companies are required to provide. The division issues certificates of authority to self-insure to CSIs that are renewed annually. CSIs may withdraw from self-insurance pursuant to Labor Code §407.045(a) by establishing "an adequate program to pay all incurred losses" (Adequate Program) approved by the commissioner. Currently, a withdrawn CSI continues to be responsible for administration and payment of all claims incurred while they were an active CSI. Additionally, a withdrawn CSI remains a certified self-insurer as defined by §114.2(b)(3), as the definition includes private employers that have "currently or for a prior period" been granted a certificate of authority to self-insure. To date, the commissioner has only approved Adequate Programs requiring ongoing claims administration, and the division has retained the security deposit from withdrawn CSIs with ongoing claims administration.

HB 1989 added §407.045(a-1) that provides that an Adequate Program required for withdrawal from certified self-insurance includes “a program in which the certified self-insurer has insured or reinsured all workers’ compensation obligations incurred by the self-insurer with an authorized insurer under an agreement that is filed with and approved in writing by the commissioner.” The division anticipates that the Texas Department of Insurance (TDI) will file a separate manual rule amendment to allow for and define an endorsement to a standard workers’ compensation policy through which a CSI can insure or reinsure with an authorized insurer all workers’ compensation obligations incurred by the CSI prior to a proposed withdrawal date. The proposed amendment to §114.2(b)(3) and new §114.16 implement HB 1989 by amending the definition of certified self-insurer, describing the TDI endorsement to the standard workers’ compensation policy required to withdraw from self-insurance with an insuring agreement, and providing the standards required of an insurance carrier seeking to assume workers’ compensation liabilities from a CSI withdrawing with an insuring agreement. The proposed new section also includes an affirmation of the commissioner’s discretion to review previously approved CSI withdrawals and, notwithstanding 28 TAC §114.4, modify the security deposit obligations.

**Amended 28 TAC §114.1 Purpose.**

Amended §114.1(c) adds “Texas Workers’ Compensation” to make clear which act is being referenced and updates “commission” to “division” to eliminate references to the former Texas Workers’ Compensation Commission, the division’s predecessor agency. These non-substantive changes are necessary for clarity and to reflect current regulatory structure and agency drafting style.

**Amended 28 TAC §114.2. Definitions.**

Amended §114.2(a)(2) has been deleted. This non-substantive change is necessary to reflect current regulatory structure and agency drafting style. The remaining subsections, (a)(3)-(5), have been renumbered accordingly without substantive amendment.

Amended §114.2(b)(2) updates “commission” to “commissioner.” The phrase "pursuant to" has been updated to "under." These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.2(b)(3) adds the clause, “except if withdrawn with an insuring agreement pursuant to Labor Code §407.045(a-1)” to the definition of certified self-insurer. This amendment is necessary to implement HB 1989. The added clause provides that a CSI withdrawing from self-insurance with an insuring agreement is no longer a CSI, by definition.

Amended §114.2(b)(5) updates “division of self-insurance regulation of the” and “Commission” to “Texas Department of Insurance, Division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.2(b)(7) has been updated to remove a semicolon and add a comma. These non-substantive changes are necessary to reflect current agency drafting style.

**Amended 28 TAC §114.3. Application Form and Financial Information Requirements.**

Amended §114.3(a) updates “director” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.3(c) updates “director” to “division” and “commission” to “division.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.3(g) updates “director” to “commissioner”. This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

**Amended 28 TAC §114.4. Security Deposit Requirements.**

Amended §114.4(a)(2) updates “director” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.4(b) updates “director” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.4(d) updates “director” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.4(e) updates “commission” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.4(f) updates “director” to “division” in two places within this subsection. These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.4(g) updates “director” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

**Amended §114.5. Excess Insurance Requirements.**

Amended §114.5(a) updates “director” to “commissioner” in two places in this subsection. These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.5(b)(1) updates “director” to “division” and “director” to “commissioner.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.5(b)(2) updates “director” to “division” and “director” to “commissioner” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.5(b)(4) adds “Texas Workers’ Compensation” to make clear which act is being referenced. This change is necessary for clarity and readability.

Amended §114.5(b)(4)(C) updates “commission” to "division." This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.5(c) updated “commission” to “commissioner” and “commission” to “division.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.5(d) updates “director” to “division” and “director” to “commissioner.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

**Amended 28 TAC §114.6. Safety Program Requirements.**

Amended §114.6(3)(C) replaces "and/or" with "or." This non-substantive change is necessary to reflect current agency drafting style.

Amended §114.6(5) updates "audit/inspection" to "audit or inspection." This non-substantive change is necessary to reflect current agency drafting style.

**Amended 28 TAC §114.7. Certification Process.**

Amended §114.7(a) updates “director” to “division” in two places in this subsection. These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.7(b) updates “director” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.7(c) updates “director” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.7(d) updates “director” to “division” and “commission” to “commissioner”. These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

**Amended §114.8. Refusal to Certify an Employer.**

Amended §114.8(a) updates “commissioners” to “commissioner”. This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.7(a)(3) updates “commission” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.8(a)(4) updates “commission” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.8(d) updates “commissioners” to “commissioner,” deleted “by majority vote” and updates “commission” to “commissioner.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

**Amended §114.9. Required Safety Program Inspections.**

Amended §114.9(a) updates “commission” to “division” and the phrase "and/or" has been updated to "or." These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.9(b) updates “commission” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.9(b)(2) updates “a Class A administrative violation” to “an administrative penalty.” This non-substantive change is necessary to reflect the statutory change made by HB 7 of the 79th Legislative Session, which eliminated all references to classes of violations.

Amended §114.9(c) updates “commission” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

**Amended §114.10. Claims Contractor Requirements.**

Amended §114.10(b) updates “director” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.10(d) adds “Texas Workers’ Compensation” to make clear which act is being referenced and updates “commission” to “division.” These non-substantive changes are necessary for clarity and to reflect current regulatory structure and agency drafting style.

**Amended §114.11. Audit Program.**

Amended §144.11(a) updates “director” to “division” and “commission” to “division.” “Texas Workers’ Compensation” has been added to make clear which act is being referenced. These non-substantive changes are necessary for clarity and to reflect current regulatory structure and agency drafting style.

Amended §114.11(b)(6) updates “commission” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.11(b)(7) updates “director” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

**Amended §114.12. Required Reporting.**

Amended §114.12(a) updates “director” to “division” in two places in this subsection and deletes the phrase “in his or her discretion.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.12(a)(1) updates “director” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.12(a)(2) updates “director” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.12(b) updates “director” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

#### **§114.13. Required Notices to the Division.**

The use of "Director" in the section title of §114.13 has been updated to "Division" to reflect current agency drafting style.

Amended §114.13(a) updates “director” to “division” in two places in this subsection and updates “director” to “commissioner.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.13(b) updates “director” to “division” and “director” to “commissioner.” The phrase “director will notify the Commissioners who” is updated to “division.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.13(c) updates “director” to “division” and “director” to “commissioner.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.13(d) updates “director” to “division” and “director” to “commissioner.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.13(e) updates “director” to “division” and “director” to “commissioner.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

Amended §114.13(f) updates the phrase “director and the director shall notify the Commission within 10 days of the approval” to “commissioner.” The phrase “this notification” changed to “approval.” “Director” is updated to “commissioner.” These non-substantive changes are necessary to reflect current regulatory structure and agency drafting style.

**Amended §114.14. Impaired Employer.**

Amended §114.14 updates “director” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.14(2) updates “commission” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

**Amended §114.15. Revocation or Suspension of Certificate of Authority to Self-Insure.**

Amended §114.15(a) updates “commission” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.15(a)(5) updates “director” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.15(a)(8) updates “Director” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.15(a)(9) adds “Texas Workers’ Compensation” to make clear which act is being referenced and updates “Commission” to “division.” These non-substantive changes are necessary for clarity and to reflect current regulatory structure and agency drafting style.

Amended §114.15(b) changed “commission” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.15(c) updates “director” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.15(d) updates “director” to “division.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

Amended §114.15(e) changed “commission” to “commissioner.” This non-substantive change is necessary to reflect current regulatory structure and agency drafting style.

**New §114.16. Withdrawal from Self-Insurance.**

New §114.16(a) has been added to define the essential elements of insuring agreements that may be submitted under Labor Code §407.045(a-1) for commissioner’s approval as a part of an adequate program to withdraw from self-insurance.

New §114.16(a)(1) specifies the form requirements for the insuring agreement used to withdraw from self-insurance, and states the insuring agreement must be a standard workers’ compensation policy providing statutory limits with an approved company specific endorsement under Texas Insurance Code §2052.002(b). It also requires the policy to provide coverage for all open, reopened, and incurred but not reported claims against the self-insured for the entire period of time it operated as a certified self-insurer. These requirements are necessary to fulfill the statutory requirement of Labor Code §407.045(a-1) that “(1) all known claims and expenses associated with

those claims; and (2) all incurred but not reported claims and expenses associated with those claims" are assumed under the insuring agreement.

New §114.16(a)(2) has been added to require that the standard workers' compensation policy and endorsement be issued by an insurance company as defined by Texas Labor Code §401.011(28). This requirement is necessary to ensure that the insurance company assuming the workers' compensation liabilities of a withdrawing CSI is an admitted carrier. This paragraph also provides a financial standard for admitted carriers that may wish to assume the responsibilities of a withdrawing CSI; the carrier may not have been found by the commissioner of insurance to be in hazardous financial condition pursuant to 28 Texas Administrative Code Chapter 8 (relating to Hazardous Condition). This standard is designed to ensure that companies assuming the liabilities of withdrawing CSIs are in good standing with TDI and are able to perform the duties required of a carrier under the Labor Code and pay all claims promptly and correctly.

New §114.16(a)(3) has been added to require that the policy period cover all claims, known and incurred, arising at any time during the period the employer operated as a certified self-insurer. This requirement is necessary because Labor Code §407.045(a-1) requires a program of insurance or reinsurance submitted for review as part of an Adequate Program for withdraw to insure or reinsure all workers' compensation obligations incurred during the employers period of self-insurance.

New §114.16(a)(4) has been added to state that the policy through which the claims of the withdrawing CSI are assumed may not be cancelled by either party. This is to ensure that the withdrawing CSI's injured employees will not be left without workers' compensation coverage and benefits.

New §114.16(a)(5) makes it clear that an insurance company that assumes all of a CSI's workers' compensation liabilities through an insuring agreement is the workers' compensation insurance carrier for the liabilities assumed for all purposes of the Texas Workers' Compensation Act. This paragraph is necessary to ensure that the assuming insurance company is subject to the Act and thereby required to comply with all requirements of an insurance carrier.

New §114.16(b) has been added to remind stakeholders that withdrawals from self-insurance must comply with all applicable statutes and rules promulgated by the commissioner of insurance and the commissioner of workers' compensation.

New §114.16(c) has been added to state the commissioner's authority to review and approve modifications to previously approved withdrawals from self-insurance, including modifications to security deposit requirements. The opportunity for modifications to the security deposits of previously withdrawn CSIs that have ongoing claims administration will ensure that the security deposit required is reasonable in light of the CSI's workers' compensation claim exposure.

New §114.16(d) has been added to make clear that the commissioner retains discretionary authority to approve, disapprove, or require modification of any proposed program for withdrawal from self-insurance

**3. FISCAL NOTE.** Nicholas Canaday, III, DWC General Counsel, has determined that for each year of the first five years the amendments and new section will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

**4. PUBLIC BENEFITS.** Mr. Canaday, has also determined that, for each year of the first five years the amended sections and new section are in effect, there will be a number of public benefits.

The public benefits anticipated because of the proposed amendments and new rule include providing CSIs with a clear path to withdraw from self-insurance with an insuring agreement, limiting the definition of CSI to exclude those withdrawn with an approved insuring agreement, and allowing for security deposit modification. Additionally, workers' compensation claimants who are employees of CSIs utilizing the insuring agreement option will be provided workers' compensation benefits through a standard workers' compensation policy issued by an admitted workers' compensation insurance carrier. CSIs that have previously withdrawn from self-insurance may, upon request to the commissioner, have their security deposits reviewed and modified. The non-substantive changes throughout Chapter 114 reflecting current agency structure are beneficial to stakeholders by providing clarity on how the workers' compensation system operates.

**5. ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL.** Mr. Canaday anticipates that there will be no costs to comply with these rules. Employers who withdraw from certified self-insurance with an insuring agreement should experience a cost savings as a result of the proposed rule amendment and new rule due to termination of ongoing regulation.

Government Code §2001.0045 requires a state agency to offset any costs associated with a proposed rule by: (1) repealing a rule imposing a total cost that is equal to or greater than that of the proposed rule; or (2) amending a rule to decrease the total cost imposed by an amount that is equal to or greater than the cost of the proposed rule. The proposed rule will not impose a cost.

**6. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.**

Government Code §2006.002(c) provides that if a proposed rule may have an economic effect on small businesses, micro-businesses, or rural communities, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule and a regulatory flexibility analysis that considers alternative methods of achieving the

purpose of the rule. Government Code §2006.001(2) defines “small business” as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. Government Code §2006.001(1) defines “micro business” similarly to “small business” but specifies that such a business may not have more than 20 employees. Government Code §2005.001(1-a) defines a “rural community” as a municipality with a population of less than 25,000.

As required by Government Code §2006.002(c), the division has determined that the proposed amendments and new section will not have an adverse economic effect on small businesses, micro businesses, or rural communities because there are no costs associated with compliance. Additionally, because the statutory requirements to be a CSI make it highly unlikely that a small or micro business would qualify to be a CSI, the proposed amendments and new section do not require small businesses, micro businesses, or rural communities to comply; therefore, the division is not required to prepare a regulatory flexibility analysis.

**7. GOVERNMENT GROWTH IMPACT STATEMENT.** Government Code §2001.0221 requires that a state agency prepare a government growth impact statement that reasonably describes the effects a proposed rule may have during the first five years it is in effect. The division has determined that the proposed rule will not create or eliminate a government program, and will not require an increase or decrease in fees paid to the division. Implementation of the proposal will not require the creation or elimination of employee positions, and will not require an increase or decrease in future legislative appropriations to the division.

The proposed amendments and new section do not create a new regulation because the existing statute and rules allow CSIs to withdraw from self-insurance. The proposed amendments

and new section build on existing regulation by adding withdrawing with an insuring agreement as an option for withdrawing from self-insurance. The number of individuals subject to the rule's applicability is not effected by the proposal. The division anticipates that the proposed amendments and new section will positively affect the state's economy by allowing CSIs to purchase a standard workers' compensation policy issued by an admitted insurance carrier for its incurred and future workers' compensation liabilities. CSIs that withdraw from self-insurance with an insuring agreement will also have their security deposits returned by the division. CSIs that have withdrawn from self-insurance that have continued claims administration will be able to request modification in their security deposit.

**8. TAKINGS IMPACT ASSESSMENT.** The division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

**9. REQUEST FOR PUBLIC COMMENT.** If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on October 15, 2018. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to [rulecomments@tdi.texas.gov](mailto:rulecomments@tdi.texas.gov) or by mail to Ashley Hyten, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If a hearing is held, the division will consider written comments and public testimony presented at the hearing.

**10. STATUTORY AUTHORITY.** The amendments and new sections are proposed under the authority of Labor Code §§401.011, 402.00111, 402.00116, 402.0215, 402.061, 407.045, 407.064, 407.065, and 415.025.

Labor Code §401.011 provides the definitions of terms used throughout Title 5 of the Labor Code including certified self-insured, commissioner, insurance carrier, and insurance company.

Labor Code §402.00111 requires the commissioner of workers' compensation to exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code 402.00116 requires the commissioner to administer and enforce the Texas Workers' Compensation Act and other workers' compensation laws of this state and laws granting jurisdiction or applicable to the division or commissioner.

Labor Code §402.0215 states that references in Title 5 of the Labor Code to the divisions, including the division of self-insurance regulation of the former Texas Workers' Compensation Commission, means the Division of Workers' Compensation of the Texas Department of Insurance.

Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §407.045(a) allows a certified self-insurer to withdraw from self-insurance with the approval of the commissioner provided the certified self-insurer has established an adequate program to for all incurred losses, including unreported losses for the period of time they operated as a certified self-insurer.

Labor Code §407.045(a-1) states that an Adequate Program includes one in which the certified self-insurer has insured or reinsured all workers' compensation obligations incurred while

acting as a certified self-insurer with an authorized insurer under an agreement filed with and approved in writing by the commissioner.

Labor Code §407.045(b) requires a certified self-insurer who withdraws from self-insurance to surrender the certificate of authority to self-insure to the division.

Labor Code §407.064(d) provides the minimum security deposit requirements for a certified self-insurer.

Labor Code §407.065 describes the security deposit requirements for certified self-insureds and states that the comptroller may accept securities for deposit or withdrawal only on the written order of the commissioner of workers' compensation.

Labor Code §415.025 provides that references in the Labor Code or in rules of the former Texas Workers' Compensation Commission or commissioner to a class of violation shall be construed as a reference to an administrative penalty.

## **11. TEXT.**

### **§114.1. Purpose.**

(a) The provisions of this chapter are promulgated pursuant to Texas Labor Code, Chapter 407, to explain and enforce provisions related to the self-insuring of liability and to guarantee full and timely payment of compensation benefits by certified self-insurers.

(b) The provisions of this chapter apply to private employers in the State of Texas. They do not apply to the state or to political subdivisions, as made clear by Texas Labor Code §401.011(6).

(c) These rules provide guidance and requirements in addition to those requirements imposed by the Texas Workers' Compensation Act and other division~~[commission]~~ rules.

### **§114.2. Definitions.**

(a) The following words and terms are defined in the Texas Labor Code §407.001, and are ~~so~~ used in this chapter:

- (1) Association;
- ~~[(2) Director;]~~
- (2)~~[(3)]~~ Impaired employer;
- (3)~~[(4)]~~ Incurred liabilities for compensation; and
- (4)~~[(5)]~~ Qualified claims servicing contractor.

(b) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--an employer that applies for an initial certificate of authority to self-insure or, once initially certified, any subsequent certificate of authority to self-insure.

(2) Certificate--A certificate of authority to self-insure issued by the commissioner~~[commissioner]~~ under Texas Labor Code §407.042, which entitles an employer to be a certified self-insurer and is valid only for the persons, firms, or corporations named on the certificate. For a certificate of authority to self-insure delivered, issued for delivery, or renewed on or after January 1, 1996, a sole proprietor, partner, or corporate executive officer of a business may be specifically excluded from coverage under~~[pursuant to]~~ Texas Labor Code §406.097.

(3) Certified self-insurer--A private employer that has been granted a certificate of authority to self-insure for payment of compensation, either currently or for a prior period except if withdrawn with an insuring agreement under Labor Code §407.045(a-1).

(4) Claims Contractor--A qualified claims servicing contractor.

(5) Division--The Texas Department of Insurance, Division of ~~[division of self-insurance regulation of the]~~ Workers' Compensation~~[Commission]~~.

(6) Excess Insurance--Insurance that an employer purchases to pay claim costs that exceed the employer's retention amount up to a specified limit.

(7) Retention--All payments that must be paid by a certified self-insurer before an excess insurance policy will respond to a loss for claims filed under the Workers' Compensation Act including[?] indemnity benefits, medical payments, death benefits, and all other related claims expenses not otherwise covered by insurance.

(8) Trust Fund--The Texas certified self-insurer guaranty trust fund created by the fee assessed by the Association for emergency payment of the compensation liabilities of an impaired employer.

### **§114.3. Application Form and Financial Information Requirements.**

(a) Employers shall submit an application by filing a completed and signed application in the form and manner prescribed by the commissioner[~~director~~] and must include:

(1) if required to file a Form 10-K by the U.S. Securities and Exchange Commission (SEC), the applicant's Form 10-K for the preceding three fiscal years; and

(2) the applicant's independently audited financial statements according to Generally Accepted Auditing Standards of the American Institute of Certified Public Accountants with the accompanying footnotes and the auditor's opinion for the preceding three fiscal years.

(b) Incomplete applications may be returned to the applicant.

(c) An incomplete application may be treated as voluntarily withdrawn if the applicant fails to respond to any request for information by the division[~~director~~] for more than 90 days from the date the request is deemed received by the applicant, as provided by division[~~commission~~] rule.

(d) The sworn affidavit required on any self-insurance application or other document requiring a sworn affidavit also applies to all attachments, additions, and any subsequent amendments to those documents.

(e) If the financial statements under subsection (a)(2) of this section are dated more than six months prior to the date of the application, interim financial statements may be required.

(f) Applicants will be evaluated for stability and financial strength. Applicants shall provide information relevant to the factors specified in Texas Labor Code §407.061 and §407.062 and shall ensure that a credit or debt rating and an analysis of that rating have been prepared by one of the following:

- (1) Dun & Bradstreet or other recognized credit reporting agency's ratings; or
- (2) debt ratings from Standard & Poor's or Moody's.

(g) In addition to reviewing the information required in subsection (f) of this section, the commissioner~~director~~ shall consider the applicant's:

- (1) liquidity ratio;
- (2) ratio of current assets to current liabilities;
- (3) ratio of tangible net worth to long-term debt;
- (4) ratio of tangible net worth to total liabilities;
- (5) cash flow;
- (6) working capital;
- (7) profitability; and
- (8) one of the following:
  - (A) Dun & Bradstreet or other recognized credit reporting agency's ratings; or
  - (B) debt ratings from Standard & Poor's or Moody's.

**§114.4. Security Deposit Requirements.**

(a) A security deposit shall be one or a combination of any of the following:

(1) surety bond. The surety bond must be issued by a company authorized to conduct such business in Texas and possess either a current A.M. Best rating of B+ or better or a Standard & Poor's rating of claims paying ability of A or better;

(2) cash, bonds or other evidence of indebtedness issued, assumed or guaranteed by the United States of America or the State of Texas. Any such securities shall be deposited with the Comptroller of Public Accounts pursuant to a trust agreement prescribed by the commissioner~~[director]~~; or

(3) irrevocable letter of credit issued by a Texas state chartered bank or a federally chartered bank with a branch office in Texas. The bank shall have a long-term debt rating of at least A or better in the current monthly edition of "Moody's Statistical Handbook" or a long-term investment grade rating of at least A or better in the current edition of "Global Ratings Handbook" prepared by Standard & Poor's Corporation. If the bank's rating subsequent to issuing the letter of credit falls below the acceptable rating, the certified self-insurer shall replace the letter of credit within 60 days with a new letter of credit issued by a bank with an acceptable rating.

(b) Bonds and irrevocable letters of credit must be in a form approved by the commissioner ~~[director]~~.

(c) A security deposit in the form of cash must be in United States currency.

(d) The amount of the security deposit shall in no case be less than the retention amount of the excess insurance required by the commissioner~~[director]~~.

(e) The commissioner~~[commissioner]~~ will not issue a certificate before the guarantor of the security has submitted to the division~~[commissioner]~~ a security deposit that meets the requirements of this section.

(f) The certified self-insurer shall notify the division~~[director]~~ if the security bond or letter of credit no longer meets the requirements of subsection (a) of this section. This notice shall be provided in writing to the division~~[director]~~ within 30 days of that change.

(g) The division~~[director]~~ may require a substitution of the security deposit in the event that the certified self-insurer's surety or guarantor no longer meets the requirements of subsection (a) of this section.

#### **§114.5. Excess Insurance Requirements.**

(a) The upper limit of liability for a contract or policy of excess insurance shall be in the amount required by the commissioner~~[director]~~. The minimum amount the commissioner~~[director]~~ may require is \$5 million per occurrence.

(b) A contract or policy of excess insurance must be issued by an insurance company authorized by the State of Texas to transact such business and shall include the following provisions:

(1) cancellation requires notice to the division~~[director]~~ in the form and manner prescribed by the commissioner~~[director]~~ at least 60 days before termination;

(2) non-renewal requires notice to the division~~[director]~~, in the form and manner prescribed by the commissioner~~[director]~~ at least 60 days before the end of the policy;

(3) the Association must be named as an additional insured on the excess policy and may assume the rights and responsibilities of the certified self-insurer under the policy when the certified self-insurer is declared to be impaired; and

(4) all of the following benefits to which the injured employee is entitled under the Texas Workers' Compensation Act must be applied toward reaching the retention amount:

- (A) payments made by the certified self-insured employer;
- (B) payments due and owing by the certified self-insured employer;
- (C) payments made on behalf of the certified self-insured employer by any form of security as required by the Act or division~~[commission]~~ rules; and
- (D) payments made by the Association pursuant to Texas Labor Code §407.121 and §407.127.

(c) The commissioner~~[commission]~~ will not issue a certificate before the excess insurance carrier has submitted to the division~~[commission]~~ evidence of a qualifying excess insurance policy that meets the requirements of this section.

(d) The certified self-insurer who elects to cancel or chooses not to renew a policy of excess insurance shall notify the division~~[director]~~ 60 days prior to the cancellation or termination in the form and manner prescribed by the commissioner~~[director]~~.

#### **§114.6. Safety Program Requirements.**

To qualify as an effective safety program under Texas Labor Code §407.061(d), an applicant's safety program must include the following components at a minimum:

- (1) A management component that includes:
  - (A) a clearly written safety policy distributed to all employees;
  - (B) a written assignment of safety responsibilities and delegation of authority which includes oversight of implementation of the safety program and the authority to communicate directly with the employer's top management regarding health and safety issues;

(C) a method of receiving, evaluating, and responding to employee input regarding workplace health and safety; and

(D) a process to ensure review and revision of the safety program when changes in processes, procedures, operations, or equipment are implemented or anticipated, to ensure continued effectiveness of the safety program.

(2) An analysis component that:

(A) facilitates the recognition of injury and illness trends, and

(B) facilitates the focus of corrective action on identified trends.

(3) A records component that requires documentation of:

(A) analysis results and any consequent improvement effort or corrective action;

(B) safety-related employee training, including the training topic and date trained;

(C) internal ~~or~~and/or external safety audits or inspections of facilities, equipment, practices, and procedures;

(D) accident investigations;

(E) safety committee meeting minutes, if such a committee is present in the workplace; and

(F) any other safety-related records deemed appropriate by the applicant.

(4) A safety-training component that provides employees with initial and recurring training on all topics required to perform assigned duties safely.

(5) An ~~audit or inspection~~audit/inspection component that requires:

(A) periodic inspections of facilities, equipment, and safety-related practices and procedures; and

(B) periodic evaluation and monitoring of industrial hygiene exposures.

(6) An accident investigation component that focuses on the identification and mitigation of causal factors.

**§114.7. Certification Process.**

(a) The division~~[director]~~ shall request review and approval of the Association by forwarding a summary of the relevant application information after the division~~[director]~~ deems the application complete and finds the applicant's financial information required under §114.3 of this title (relating to Application Form and Financial Information Requirements) reflects one of the following qualifying financial ratings:

(1) Dun & Bradstreet rating of 3A1 or better;

(2) Standard & Poor's rating of BBB or better;

(3) Moody's rating of Baa or better; or

(4) minimum tangible net worth of \$5 million with a ratio of tangible net worth to long-term debt of 1.5 to one or greater.

(b) The division~~[director]~~ may audit information supplied by an employer applying for a certificate.

(c) The division~~[director]~~ shall recommend an applicant for certification only with approval of the application by the Association. Failure of the Association to respond within 120 days after the Association's receipt of the information provided for in subsection (a) of this section will be deemed as the Association's approval of an applicant to be a certified self-insurer.

(d) Within a reasonable time after approval by the Association of a completed application, the division~~[director]~~ will recommend to the commissioner~~[commissioner]~~ approval or denial of the

application at a public meeting for self-insurance business (generally quarterly) that follows the completion of an application and the approval process described in subsection (c) of this section.

**§114.8. Refusal to Certify an Employer.**

(a) When the commissioner determines [~~commissioners determine~~] an application should be denied, the applicant will be notified of the following:

(1) the specific reasons for the denial;

(2) the specific conditions, if any, the applicant must meet to become certified;

(3) that the applicant has a 30-day period from the date the applicant receives the notice to meet the conditions required or provide compelling information to the division[~~commission~~] to rebut the reasons for denial; and

(4) the form and format required to notify the division[~~commission~~] of the actions taken by the applicant to overcome the denial.

(b) The notice described in subsection (a) of this section shall be:

(1) in writing; and

(2) sent to the contact person, return receipt requested.

(c) The denial becomes final on the 31st day after the applicant receives the notice of denial if the applicant has not responded.

(d) When the applicant timely responds to the denial, the commissioner[~~commissioners~~] may grant or deny the application[~~by majority vote~~] within 130 days after the applicant received the notice of denial, and such action shall be final immediately. If the commissioner[~~commission~~] fails to take action within 130 days after the applicant received the notice of denial, the denial becomes final on the 131st day.

**§114.9. Required Safety Program Inspections.**

(a) An employer seeking to obtain a certificate shall have its safety program reviewed ~~or~~~~and/or~~ inspected by the division~~[commission]~~ before the issuance of its initial certificate and thereafter, as appropriate, to demonstrate the existence of an effective safety program for each location.

(b) To facilitate the review or inspection process, the employer shall provide the division~~[commission]~~ with access to all of the documents related to its safety program and its workers' compensation claims and shall permit the inspection of any of its work sites during working hours. Unreasonable refusal to provide access to the required information or facilities may be considered as:

(1) submission of an incomplete application or grounds for revocation of a certificate;  
and

(2) an~~[a Class A]~~ administrative penalty~~[violation]~~ with each day of noncompliance constituting a separate violation.

(c) Unless significant deficiencies are noted in a safety program review or inspection, the division~~[commission]~~ is not required to issue a review or inspection report.

#### **§114.10. Claims Contractor Requirements.**

(a) Claims administration must be performed by an adjuster licensed in Texas to handle workers' compensation claims.

(b) Each proposed contract to provide claims services to a certified self-insurer must be approved by the division~~[director]~~ prior to recommending approval of an application to self-insure or, if a certified self-insurer is changing from one claims contractor to another, prior to the effective date of the new contract.

(c) An applicant must ensure that a current signed claims administration contract remain on file with the division at all times.

(d) The claims contractor must promptly investigate each reportable injury and either pay benefits or controvert, as required by the Texas Workers' Compensation Act and division[commission] rules.

**§114.11. Audit Program.**

(a) The division[director] shall audit certified self-insurers as frequently as necessary to assure compliance with the Texas Workers' Compensation Act and division[commission] rules, but shall audit each certified self-insurer at least once every three years.

(b) An audit may include, but not be limited to:

(1) any representation made on an application or in an annual report required by §114.15(b) of this title (relating to Revocation of Certificate of Authority to Self-Insure);

(2) payroll and classification;

(3) loss history;

(4) claims administration;

(5) loss reserves;

(6) interviews of the certified self-insurer, its agents, or employees regarding any matter within their knowledge and pertaining to the obligations of the certified self-insurer under the Act or division[commission] rules; and

(7) any other issue deemed appropriate by the division[director].

(c) A written report shall be provided to the certified self-insurer within 30 days after the audit is completed.

(d) A certified self-insurer's unreasonable refusal to make the required information available constitutes:

(1) grounds for revocation of the certificate; and

(2) a Class A administrative violation, with each day of noncompliance constituting a separate violation.

#### **§114.12. Required Reporting.**

(a) Each certified self-insurer shall file with the division an annual application or, if required by §114.15(b) of this title (relating to Revocation of Certificate of Authority to Self-Insure), an annual report, according to a schedule established by the division~~[director]~~. The division~~[director]~~ may~~[, in his or her discretion,]~~ require an annual application or annual report to include the following:

(1) claims information, such as loss run information, in the form and manner prescribed by the commissioner~~[director]~~;

(2) an information report, in the manner prescribed by the commissioner~~[director]~~, that includes an analysis of accident trends which:

(A) identifies losses by location, occupation, or job function; and

(B) provides an analysis of those losses based on:

(i) nature, source, and severity of the injury;

(ii) cause of the injury;

(iii) parts of the body affected;

(iv) equipment involved in the injury;

(v) number of injuries and fatalities other than occupational diseases; and

(vi) identification of the number of occupational diseases;

(3) independently audited financial statements according to Generally Accepted Auditing Standards of the American Institute of Certified Public Accountants; and

(4) any substantive policy or procedure changes in the certified self-insurer's safety program.

(b) If any of the information required by this section is more than six months old, it may be considered incomplete and the division~~[director]~~ may require the certified self-insurer to provide updated information.

(c) An application, annual report required by §114.15(b) of this title (relating to Revocation of Certificate of Authority to Self-Insure), or other designated document will not be complete until all parts of the document, including all required attachments and any required updates, are filed.

**§114.13. Required Notices to the Division~~[Director]~~.**

(a) A certified self-insurer that amends its charter, articles of incorporation, or partnership agreement to change its identity or business structure, or in any other manner materially alters its status as it existed at the time of issuance of its certificate shall, within 30 days after the amendment or other action, notify the division~~[director]~~ of such action in the form and manner prescribed by the commissioner~~[director]~~ and provide the division~~[director]~~ with a copy of such amendment or other action.

(b) A certified self-insurer that ceases doing business entirely, ceases doing business in Texas, or disposes of, by sale or otherwise, the controlling interest of the business for which the certificate was issued, shall immediately notify the division~~[director]~~ in the form and manner prescribed by the commissioner~~[director]~~ of such action and the division~~[director]~~ will notify the ~~Commissioners who~~ will act on the notice pursuant to Texas Labor Code, §407.045.

(c) A certified self-insurer shall give notice to the division~~[director]~~ in the form and manner prescribed by the commissioner~~[director]~~ of any change in contact person within 10 working days of this change. The notice shall include the name, title, office address, and telephone number, facsimile number and e-mail address of the new contact person.

(d) A certified self-insurer shall give notice to the division~~[director]~~ in the form and manner prescribed by the commissioner~~[director]~~ at least 30 days prior to any change in the claims contractor. The notice shall include the name, title, office address, and telephone number, facsimile number and e-mail address of the person or persons appointed to administer both the existing cases and the new cases and the location or locations of records required to be kept and maintained pursuant to Texas Labor Code, §407.082.

(e) A certified self-insurer shall notify the division~~[director]~~ in the form and manner prescribed by the commissioner~~[director]~~ of any change or expected change which will significantly alter the liability or solvency of the certified self-insurer within 30 days of the certified self-insurer's knowledge of the change.

(f) For purposes of §406.006 of the Texas Labor Code, coverage takes effect upon approval by the commissioner. Approval~~[director and the director shall notify the Commission within 10 days of the approval].~~ ~~[This notification]~~ by the commissioner~~[director]~~ fulfills the certified self-insurer's requirement to file notice of coverage and claim administration contact information as required by §406.006.

#### **§114.14. Impaired Employer.**

If a certified self-insurer becomes an impaired employer, the commissioner~~[director]~~ shall protect the employees of such employer by promptly:

- (1) calling the security deposit and placing the funds in an account for the impaired employer;

(2) notifying the Association or other entity designated by the commissioner~~[commissioner]~~ to assume the liabilities of the impaired employer; to begin paying, pursuant to Texas Labor Code §407.127, benefits out of the impaired employer's account; and, if necessary, to notify the Association to begin paying benefits out of its trust fund; and

(3) estimating the amount of any additional funds needed to supplement the security deposit and available assets of the impaired employer and advise the Association of the amount the Association will need to assess each certified self-insurer to cover the estimated liabilities once the impaired employer's security account has been expended.

**§114.15. Revocation or Suspension of Certificate of Authority to Te Self-Insure.**

(a) The commissioner~~[commissioner]~~ may revoke the certificate of a certified self-insurer who fails to comply with requirements or conditions established by Chapter 407 of the Texas Labor Code or any rule within Chapter 114 of this title (regarding Self-Insurance), including:

- (1) failure to maintain financial strength;
- (2) failure to implement and maintain an effective safety program;
- (3) failure to maintain acceptable claim services;
- (4) failure to obtain and maintain the required security deposit;
- (5) failure to obtain and maintain excess insurance as required by the

commissioner~~[director]~~;

(6) failure to file any required information under §114.12 of this title (relating to Required Reporting);

(7) unreasonable refusal to make information available as required under §114.11 of this title (relating to Audit Program);

(8) failure to provide notice as required in §114.13 of this title (relating to Required Notices to the division~~[Director]~~); or

(9) failure to comply with any provision of the Texas Workers' Compensation Act or with any division~~[commission]~~ rule.

(b) The commissioner~~[commission]~~ may suspend or revoke the certificate of a certified self-insurer due to the certified self-insurer's failure to pay an assessment as required by Texas Labor Code §407.124(b) and §407.125.

(c) A certified self-insurer whose certificate has been revoked, suspended, withdrawn, or denied must file an annual report, in the form and manner prescribed by the commissioner~~[director]~~.

(d) Pursuant to Texas Labor Code §§407.046, 407.047, and 407.082, the division~~[director]~~ shall continue to audit the claims of any certified self-insurer whose certificate has been revoked, suspended, withdrawn, or denied.

(e) Prior to revoking a certificate, the commissioner~~[commission]~~ shall refer the matter to the State Office of Administrative Hearings, which shall hold a hearing to determine if the certificate should be revoked.

#### **§114.16 Withdrawal from Self-Insurance**

(a) Insuring agreements under Labor Code §407.045(a-1) filed for the commissioner's approval as a part of an adequate program to withdraw from self-insurance must meet the following criteria:

(1) The form of an insuring agreement must be that of a standard workers' compensation policy providing statutory limits with an approved company specific endorsement under Texas Insurance Code §2052.002(b) providing coverage for all open, reopened, and incurred

but not reported claims against the self-insured employer for the entire period of time it operated as a certified self-insurer.

(2) The insurance policy must be issued by an insurance company as defined by Texas Labor Code §401.011(28) that has not been determined to be in hazardous financial condition by the commissioner of insurance pursuant to Chapter 8 of this title (relating to Hazardous Condition).

(3) The policy period must be retrospective providing coverage for the entire period of time the employer operated as a certified self-insurer.

(4) The policy as endorsed must be noncancelable by either the insurance company or the certified self-insured employer for any reason.

(5) The insurance company issuing an insuring agreement that covers all the workers' compensation liabilities of a certified self-insurer becomes the workers' compensation insurance carrier for the liabilities covered for all purposes of the Texas Workers' Compensation Act and division rules.

(b) Withdrawals from self-insurance must comply with all applicable statutes and all applicable rules promulgated by the commissioner of insurance and the commissioner of workers' compensation.

(c) Notwithstanding the security deposit requirements in §114.4 of this title (relating to Security Deposit Requirements), the commissioner may review and approve modifications to previously approved withdrawals from self-insurance, including modifications to security deposit requirements.

(d) The commissioner retains discretionary authority to approve, disapprove, or require modification of any proposed program for withdrawal from self-insurance presented by a certified self-insurer.

**12. CERTIFICATION.** The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued at Austin, Texas, on August 10, 2018.

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Nicholas Canaday III  
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Texas Department of Insurance,  
Division of Workers' Compensation