

Bill Analysis, HB 2634

SUBJECT: Establishes Self-Insurer Security Fund for certain employers subject to workers' compensation laws. Requires self-insured employers to become members of fund. Instructs Director of Department and Consumer and Business Services to adopt rules related to fund and alternative security deposit system. Requires fund to adopt certain bylaws and to set assessment for members. Requires fund to make annual report to director and members of fund. Imposes penalties for certain violations.

SPONSOR: Rep. Clem (at the request of Oregon Self Insurers Association) (Pre-session filed.)

Existing Law:

- Allows employers that qualify to self-insure their workers' compensation liability.
- Allows the director to set qualifications and also revoke self-insurance status of an employer.
- Requires self-insured employers to post security deposits (*i.e.*, letter of credit or surety bond) to cover claim liability in the event employers default on claim payments or become insolvent.
- If a self-insured employer defaults in payments, or other payments due the director, allows the director to use the security deposit to cover payment of medical and disability benefits to workers.
- Requires the director to maintain a reserve fund within the Consumer and Business Services Fund to pay transitional benefits to workers of insolvent employers. Allows the director to assess self-insured employers to fund the reserve.
- Allows the director to impose civil penalties against a self-insured employer.

This bill:

- Establishes the Self-Insurance Security Fund in the form of a nonprofit mutual benefit corporation, and provides a board of trustees selected by members and approved by the director.
- Defines, for purposes of the bill, a self-insured employer as an employer that self insures excluding public entities and self-insured groups. Requires a self-insured employer to become and remain members of the corporation as a condition of being self-insured.
- If the director revokes an employer's self-insurance certification, requires the employer's liabilities be turned over to the Fund by the director, and the employer forfeits its membership in the corporation.
- Exempts the Fund and its members from paying assessments into the Self-Insured Employer Adjustment Reserve.
- Allows the Fund to carry out its responsibilities directly or by contract, to purchase services and insurance, and to borrow funds to protect the board members and employees of the Fund.
- Requires the director to adopt rules that requires the director to set a total security requirement for participating self-insured employers based on a review of annual reports and other information required by the director.
- Allows the Fund to pay the "composite deposit" (*i.e.*, the total security deposit on behalf of fund members) in a combination of cash and securities, surety bonds, irrevocable letters of credit, insurance or other financial instruments or guarantees sufficient to meet the security requirement established by the director.

- Requires the director to object to the proposed composite deposit within 30 days. If the director does not object to the proposed composite deposit within 30 days, the proposal is approved by the director by operation of law.
- If the director rejects the composite deposit or the Fund fails to provide the required composite deposit, each Fund member must individually post a security deposit or purchase insurance, and the Fund must refund members' paid deposit assessment.
- Requires self-insured employers who are excluded from participation in the alternative security deposit system to provide separate and individual security deposits with the director.
- Requires self-insured employers who are not members or are excluded from participation in the Fund to follow existing requirements of purchasing insurance or being individually self-insured.
- Allows the Fund to assess its members' amounts necessary to carry out the purposes of the bill. The Fund may only the use of money or other assets it holds only for the purposes stated.
- Requires the Fund to set and collect a deposit assessment from participating self-insured employer members in an amount sufficient to secure the collective liabilities of the Fund. Members must pay the assessment within 30 days. Members lose all right to, title to and interest in the assessment once paid to the corporation. Surplus cash in the Fund remains in the Fund and contributes to the composite deposit for the next year.
- Requires the director to adopt rules related to the confidentiality and conditions of access to employers' financial information and allows the Fund to access the information. Allows the Fund to receive confidential information from the director about the financial condition of each member self-insured employer.
- Provides that the self-insured employer loses all right to, title to and interest in, and any right to control, all assets or obligations posted or left on deposit as security.
- Allows the director to assess civil penalties of not less than 10 percent of the deposit assessment against Fund members and require separate, individual security deposits for any self-insurer that fails to timely pay the deposit assessment. Allows the director to revoke the self-insurance certification against members who fail to timely pay the deposit assessment. Requires the director to transfer monetary penalties for failing to timely pay the deposit assessment to the Fund.
- Requires the director to order the Fund to pay benefits when a self-insured employer has failed to pay workers' compensation benefits. The Fund must assume payment of workers' compensation benefits due under chapter 656 for all self-insured employers.
- Requires the director to transfer a self-insured employer's individually-held security to the Fund when the employer fails to pay the deposit assessment.
- Authorizes the Fund to maintain a fund, invest the cash portion, and use the funds to pay claims of self-insured employers that fail to pay the deposit assessment, purchase financial instruments, pay reasonable administrative expenses of the Fund or establish a cash reserve for other purposes authorized by the director by rule.
- Requires the Fund to set minimum credit, financial or other conditions that a self-insured employer must meet to be a fully or partially participating self-insured employer in the alternative security deposit system.
- Allows the director to assess a civil penalty of not more than \$2,000 per violation nor more than \$10,000 per quarter against self-insured employers who fail to provide reports or information required under the bill, which is payable directly to the Fund.
- Requires an employer that has ceased to be self-insured to: file annual reports with the director to carry out the requirements of chapter 656; deposit and maintain security for accrued liability for payment of workers' compensation benefits that may become due; and pay all assessments for

when the employer's certificate of self-insurance was in effect within 30 days of receiving notice.

- Allows the director to order compliance, restitution for any losses, and impose an additional civil penalty for any self-insured employer who fails to secure the incurred workers' compensation liabilities at all times under section five of the bill, which is payable to the Fund. Limits the additional civil penalty of up to five percent of the incurred liabilities reported in the last report or \$1,500 for each 30-day period or portion thereof when a self-insured employer fails to file a complete or timely annual report. Allows additional civil penalty for failing to file a complete or timely report is increased if the failure is malicious, fraudulent, the result of bad faith, or a repeated violation.
- Allows the director to assess an additional penalty of the lesser of the total deposit assessment or \$2,500 for each 30-day period or portion thereof against a self-insured employer for failure to timely or completely pay the deposit requirement.
- Provides that the penalties are in addition to other remedies and penalties under the workers' compensation law for failing to secure payment of workers' compensation benefits.
- Allows a self-insured employer to challenge the amount of the deposit assessment or liability for the assessment.
- Allows the director to waive, release, compromise, or order the Fund to refund a deposit assessment if the director or a court concludes that the amount assessed was excessive or that the self-insured employer is not liable for the assessment.
- Requires the Fund to assume all workers' compensation obligations of an insolvent self-insured employer, including those obligations of self-insured employer that became insolvent prior to the creation of the Fund.
- Requires the director or any custodian, surety or issuer of any irrevocable letter of credit to convey to the Fund the security and the interest that has accrued since the date of the self-insured employer's default or insolvency and allows the fund to take possession of the security deposit. Requires the Fund to make payments of the obligations of the self-insured employer within 30 days of receiving notice from the director.
- Allows the director to liquidate the deposit of an insolvent self-insured employer and use the money to pay the insolvent self-insured employer's incurred liabilities either directly or through the Fund.
- Requires the director to promptly advise the Fund when information indicates a self-insured employer may be unable to meet its compensation obligations, and advise the Fund of all determinations and directives made or issued against the self-insured employer.
- Allows a self-insured employer to contest any decision of the director or the Fund under ORS 656.704.
- Releases the Fund from any liability for penalties assessed against member self-insured employers under other provisions of the workers' compensation law.
- Requires the Fund to be a party in all proceedings involving workers' compensation claims against an insolvent self-insured employer whose workers' compensation obligations have been assumed by the Fund.
- Allows the Fund to: investigate, process, accept or deny claims; receive notice of, adjust, compromise, settle and pay claims; and appear in any proceeding related to a claim, defend claims and appeal claims.
- Requires the Fund to obtain reimbursement from an insolvent self-insured employer up to the amount of the self-insured employer's workers' compensation obligations and legal costs, including, but is not limited to, reimbursements for wages and other necessities of life advanced to a claimant in any action to collect against the self-insured employer as the debtor in which the

Fund is the subrogee of the claimant. Allows the Fund to sue any person, including, but not limited to, an excess insurance carrier of the self-insured employer and a person whose negligence or breach of an obligation contributed to an underestimation of the self-insured employer's total accrued liability, as reported to the director to recover compensation paid and liability assumed by the Fund.

- Allows the Fund to join as a party any action by a person seeking damages from the failure of an insolvent self-insured employer to pay workers' compensation benefits under chapter 656.
- Gives the Fund the same priority over other debts of the principal or principal's estate as is given by law to the person directly entitled to workers' compensation benefits.
- Limits the Fund's liability for claims to the amount of the claim due a claimant under chapter 656 and is offset by any claim liability owing under the Longshore and Harbor Workers' Compensation Act.
- Provides that a member's failure to timely pay the required deposit assessment is good cause for the director to revoke the member's self-insurance certification.
- Requires the Fund to certify to the director the receipt, collection and delinquencies in payment of all moneys from assessments and penalties payable to the Fund and requires the Fund to take any action it deems appropriate to collect delinquent assessments and penalties.
- Requires the Fund to contract for an independent audit of the financial activities of the fund.
- Requires the Fund to submit an annual report on its financial status to the director on June 30 of each year, and to each member by December 1 of each year.
- Exempts the Fund from paying any fees or taxes levied by the state, any city, county, or district or other political subdivision of the state, except for fees and taxes levied on real or personal property.
- Requires a stay of any pending proceedings in which an insolvent self-insured employer is a party under chapter 656 when the director has ordered the Fund to assume the workers' compensation obligations of an insolvent self-insured employer.
- Allows the Fund to apply to set aside any judgment entered against an insolvent self-insured employer when the order was based on default or the insolvent self-insured employer failed to defend against.
- Requires the judgment to be set aside to allow the Fund to defend against a claim based on its merits.
- Allows a party dissatisfied with an action by the Fund regarding a matter other than a matter concerning a claim to request a hearing.
- Extends the exclusive remedy provisions of ORS 656.017 to the Fund, the members of the Fund, the Fund's claims administrator, and the Fund's contracted agents, employees, officers and directors, and insurers.
- Takes effect on January 1, 2014.

Analysis

1. Under current law, employers that employ subject workers must either purchase workers' compensation insurance or be certified as a self-insured employer. Oregon has 125 self-insured employers, representing 166 business entities. An employer may also qualify as a self-insured employer as a member of a self-insured group. Employers who wish to be self-insured must obtain excess insurance coverage in amounts approved by the director, must provide assurances that they can process claims promptly, and must provide the financial ability to pay benefits due workers who are injured on the job. Any employers that qualify may be certified as an individually self-insured employer or a self-insured group.

The bill requires that self-insured employers become members of and maintain membership in the Self-Insurance Security Fund (Fund), a nonprofit mutual benefit corporation. In addition to requiring an employer to qualify as self-insured employer, employers must meet minimum credit, financial or other conditions set by the Fund to fully or partially participate in the alternative security deposit system. The bill expressly excludes employers who are members of self-insured groups and public entities from membership in the Fund.

2. Current law requires a self-insured employer to maintain a mix of excess insurance and security deposits sufficient to cover the cost of its workers' compensation liabilities for the individual employer. A self-insured group must maintain a common claim fund, excess insurance and security deposit sufficient to cover the cost of workers' compensation liabilities for all members. The department audits a portion of self-insured employer each year to evaluate their reports of current and future liability (medical and wage-loss benefits) for each claim of the self-insured employer.

In addition to the requirements to ensure benefits, the director assesses self-insured employers and groups 0.02 percent of what their premium would have been if they employers purchased insurance. The assessment for individual employers is deposited into the Self-Insured Employer Adjustment Reserve, and the assessment for groups is deposited into the Self-Insured Employer Group Adjustment Reserve. Money in the reserves is used when a self-insured employer or group does not pay workers' compensation benefits or becomes insolvent. The money in the reserves provides a method of paying benefits so workers are provided a seamless transition until the director demands performance on the security deposit and receives the cash value of the security. The benefits are then paid out of the proceeds of the security deposit. The director holds approximately \$170 million in total security deposit for individually self-insured employers. The director allows the use of surety bonds and irrevocable letters of credit for employers to post as its self-insurance security deposit.

Proponents of the bill have said that the purpose of the alternative security deposit system is to establish a collective security for self-insured employers who are members of the Fund to free up money and credit for the individual employers. This would allow employers to use that money elsewhere, improve their individual credit ratings, and allow access to more capital. Over time, the Fund's security would be invested and grow, which would further reduce the deposit assessment that each self-insured employer pays to the Fund.

3. The bill does not provide direction in the event the Fund is dissolved or becomes insolvent. Under the current law, when a self-insured employer group becomes insolvent, the members of the group are jointly and severally responsible for the workers' compensation liabilities of the group. Each member may be jointly or individually assessed to cover the insolvent or defaulting group's liabilities. However, Oregon law related to actions to collect debts from members of a corporation requires final judgment against the corporation, and the corporation has failed to perform under the judgment, unless executing the judgment would be useless. The director would then be required to file actions against the individual members. It is uncertain whether the director may exercise the same authority to directly assess members of the Fund without first obtaining a judgment against the Fund. Under the bill, only the Fund is immediately liable for the aggregated incurred liabilities of the members.

In the event the Fund is dissolved or becomes insolvent, presumably the director would use the moneys in the Self-Insured Employers Adjustment Reserve to begin paying on the claims. Because members of the Fund are excluded from paying the assessment into the adjustment reserve, excluded members, and public entities will bear the burden of paying the claims for which the Fund is

responsible, until the legal proceedings necessary to execute judgment was complete. In addition, the bill allows the Fund to borrow money necessary to protect board members and employees. In the event of dissolution or insolvency of the Fund, the director would compete against other creditors to access reimbursement for the claim obligations required under the statute.

Under current law, the security deposits are dedicated to paying claims and have not been considered attachable assets in bankruptcy. As a result, there is no delay in paying benefits to workers, or shifting the burden of paying those benefits to other employers and workers. Under the bill, the use of cash and securities is problematic in the event the Fund becomes insolvent because bankruptcy courts have consistently held that cash and securities are assets of the company and are subject to disbursement among all creditors joining the proceeding.

4. Workers' compensation administration, regulation and enforcement are funded by direct assessments on employers and workers. Under the bill, the Fund and its members are exempt from paying the 0.02 percent surcharge into the Self-Insured Employer Adjustment Reserve. In addition, section 10(2) of the bill provides that the Fund is exempt from all fees and taxes levied by the state or by any city, county, district or other political subdivision of the state, except real and personal property taxes. The bill also creates new regulatory and enforcement obligations for the benefit of the Fund and the participating members. For existence, the director must approve the composite deposit and assess and collect penalties against employers for failing to pay the deposit assessments. The bill shifts the director's costs for providing services on behalf of the Fund to other employers.
5. The bill requires the Fund to obtain reimbursement from an insolvent self-insured employer up to the amount of the self-insured employer's workers' compensation obligations and legal costs, including, but not limited to, reimbursements for wages and other necessities of life advanced to a claimant. The bill allows the Fund to assume a claimant's standing to seek reimbursement from a self-insured employer. The bill does not define "other necessities of life advanced to the claimant." Current law defining compensation or benefits does not include other necessities of life. In addition, the bill identifies the uses for the Fund's monies only relates to workers' compensation obligations, and does not include any allowance for other necessities of life. The term may broaden what is included as wage-replacement and medical benefits contemplated in workers' compensation.
6. The director's current regulatory practice requires individual self-insured employers to post low-risk, executable-on-demand security deposits, such as surety bonds and irrevocable letters of credit. The instruments are low risk because bankruptcy courts have not attached them as assets of the insolvent self-insured employer. As a result, the insolvent self-insured's workers' compensation liabilities have been its responsibility and not been imposed on other self-insured employers beyond the assessment paid to the adjustment reserve.

The bill requires the director to establish a deposit requirement necessary to meet the incurred liabilities of Fund members. The Fund then proposes a "composite deposit" as the means of providing security to cover the members' incurred liabilities. The composite deposit is the collective security deposit for participating members. If the director does not approve or object to the composite deposit within 30 days, the composite deposit is approved by operation of law. If the director rejects the composite deposit, then each self-insured member of the Fund must post its individual security deposit as determined under the existing self-insurance laws and rules, or purchase self-insurance. The bill does not provide a timeframe within which the self-insured may post a security deposit or purchase insurance. In other circumstances when an insurer does not renew

or cancels an employer's insurance, the employer is given 30 days to cover its workers' compensation requirements through self-insurance or purchasing insurance.

The bill allows the composite deposit consist of cash, investments, and other financial instruments. There is no definition for what types of financial instruments are permissible, other than the director may approve or disapprove the deposit in whole. In prior conversations with the Oregon Self-Insured Association, the representatives have stated the intent to use investments and "credit default swaps" or derivatives to transfer the financial risk of the Fund. It is possible that cash, investments and credit default swaps will be considered assets of the Fund, and do not provide the low-risk, performance-on-demand security in the event the Fund becomes insolvent. In addition, credit default swaps continue to be viewed as high-risk investments because of the lack of transparency when traded outside the United States and potential for lower-than-expected return.

7. Each self-insured employer, other than public entities and groups, must become and remain members of the Fund as a condition of being self-insured. The bill uses the terms "full" or "partially" participating self-insured employer, but does not define those terms. Within the context of the bill it could mean that members can participate fully by including all incurred liabilities within the alternative security deposit system (Fund), or partially by including only a portion of liabilities within the alternative security deposit system. The bill also allows the director or the Fund to exclude members from participation in the alternative security deposit system; however, the bill does not specify whether the standards are the same. If a member is excluded from participation, the assumption is the member would continue to be assessed by the Fund based on the security deposit requirement of participating members as set by the director, and the member excluded from participation is also required to provide an individual security deposit to cover its own liabilities. The bill does not provide any notice requirement (e.g., 30 days) to a self-insured employer who is excluded from participation to allow reasonable time to purchase insurance or post adequate security with the director.

In addition, the bill creates a process that allows injured workers' benefits to be delayed. In the event of a self-insured employer's insolvency, the director must first order payment, and the Fund has a minimum of 30 days or 60 days (see sections 7 and 11) to begin paying claims. Under the current law, the director would access the Self-Insured Employers Adjustment Reserve to ensure injured workers' received timely payment of medical and wage-loss benefits. The bill does not provide a similar mechanism for the director to ensure workers receive their benefits through the Fund.

8. There appears to be some inconsistently used terms throughout the bill. There are references to self-insured employers who are members versus non-members. The bill also makes reference to fully and partially participating self-insured employers or are specifically excluded from participation. Section 4, paragraph (d) of the bill provides that "employers not designated for full or partial participation in the Fund shall meet all requirements as established by the director and the Fund." Under the context of the bill, a self-insured employer that is excluded from participating in the Fund is required to meet the requirements of the Fund. However, the bill also requires that a self-insured employer excluded from participation to post individual security deposit with the director under ORS 656.704. The bill requires employers that chose to no longer be self-insured or become insolvent must secure the payment of workers' compensation benefits that accrued during the period of self-insurance. In another section the bill requires that all self-insured employers' workers' compensation liabilities will be paid by the Fund. The two requirements for insolvent self-insured employers create confusion and is problematic.

9. The bill provides the director with authority to sanction and issue penalties against self-insured employers that are in addition to existing penalties under the workers' compensation law. The director may assess a civil penalty and revoke the self-insurance certification. The bill provides that the director may assess a penalty when a self-insured employer fails to: file a report with the director; secure its incurred liabilities; and file a complete and timely annual report; and completely or timely pay the deposit assessment. In some instances the director collects the penalty and transfers the money to the Fund, in others the penalty is paid directly to the Fund. The bill also allows the director to order a self-insured employer to comply with the law and provide restitution for any losses. While the bill gives the Fund the authority take any action necessary, the provisions of the bill in essence require the director to act as the Fund's collection agency.
10. The bill provides that the Fund may use the funds it holds to pay claims of self-insured employers that fail to pay the deposit assessment. Another provision states that the director shall turn over the security deposit of a self-insured employer that failed to pay the deposit assessment. However, the bill only allows the director to order the Fund to assume payment when a self-insured employer is insolvent. Other provisions provide the director must provide the Fund notice in the event a self-insured employer may become or is insolvent. The apparent inconsistent procedural requirements makes adopting rules to implement the alternative security deposit system more complicated and problematic.
11. Some provisions of the bill are inconsistent with the exclusive remedy provisions of the workers' compensation law. The bill allows self-insured employers access to administrative proceedings through the director or the Workers' Compensation Board when they disagree with any action taken by the director or the Fund, or disagree with the calculation of the deposit assessment. However, the bill also provides that the Fund may sue "any person" or take actions against self-insured employers, which is presumably for actions outside the jurisdiction of the director and the Board. In addition, the bill does not provide time limits on when the Fund may take action. It also appears the Fund may re-raise issues for litigation that would otherwise be barred under legal doctrine.
12. The bill does not specify that the Fund is self-insured nor is the Fund designated as an insurance company. The director's enforcement authority is generally limited to employers for providing coverage, and insurers or self-insured employers for processing claims. As a result, the Fund does not fall under the administrative, regulatory or enforcement action of the director, other than specifically authorized in the bill. Because the Fund is responsible to process claims of insolvent self-insured employers, the director could not sanction or penalize the Fund for failing to timely and accurately pay workers' benefits, rate impairment, or other claims processing requirements under the law and rules.
13. The bill is silent on how to transition from the current self-insurance program to the collective alternative security deposit system. The director's interest is to ensure that workers benefits are protected to the greatest extent possible through the transition. Because the bill is silent on this, the director assumes that the bill requires the director to hold the \$170 million worth of security deposits, and reduce those amounts as the Fund's composite deposit grows over time. Because of the language in existing surety bonds and letters of credit, it is unlikely the director has the ability to transfer the interest in those instruments or the proceeds directly to the Fund. The bill is clear that proceeds collected by demanding performance of an insolvent employer's security deposit and the insolvent employer's workers' compensation claims are transferred to the Fund. The bill also does not address what to do with the Self-Insured Employer Adjustment Reserve. We suggest that the transition be included in the bill.

Questions and/or suggested amendments:

1. The bill defines “self-insured employer” as an employer the director certifies to self-insure, but excludes self-insured employer groups and public entities. Current law (ORS 656.005(25)) defines “self-insured employer” as an employer(s) the director certifies to self-insure individually or as a group. The separate, contradictory definitions could create confusion and difficulty when interpreting provisions of the law related to self-insurance.
2. The bill establishes the Fund as a corporation, and allows the Fund collect assessments, hold cash, investments and other financial instruments. The bill does not establish or designate the Fund as a state fund (e.g., the Consumer and Business Services Fund), nor does the bill require the monies to be held or invested by the Oregon State Treasurer. It is not clear what, if any, legislative oversight of the Fund the bill requires. In addition, the bill allows the Fund to incur debt by borrowing money to protect (indemnify) the Board members and employees. The issues related to whether the Fund, by virtue of being statutorily created, is a state entity or fund that is subject to rules of public contracting, public fund management, and other legal requirements of state agencies should be submitted to the Department of Justice, Secretary of State and Oregon State Treasurer.
3. The bill becomes effective on January 1, 2014. To implement the bill and allow time for the Fund to incorporate, the Fund to elect board members and hire staff, the director to hire additional staff for reviewing financial documents, and adopting comprehensive rules to establish the alternative security deposit system, the director suggests an operative date of at least 18 months after the bill becomes effective.
4. Because the director does not have the expertise to determine whether a financial and investment plan is prudent, sound, and in the best interest of the Fund members, non-member self-insured employers, and injured workers, we suggest the bill be amended to allow the director contract with a panel of financial experts to advise the director on the plan, or refer to another qualified state agency for review and advice. In the alternative, the agency’s fiscal impact statement will include an estimate of providing this service in-house.
5. The definitions used in the bill appear to be used inconsistently and at times are contradictory. For example, self-insured employer at times excludes public entities, self-insured groups, and self-insured employers that are excluded from participation because they don’t meet the financial requirements established by the Fund. However, in other provisions, the bill seems to include all self-insured employers whether participating or not. In addition, the phrase “fully and partially participating” is not defined in the bill. We suggest the bill clearly define what the phrase means.
6. In some cases, time frames are not clear. For example, the bill does not provide time frames for a self-insured employer for whom the Fund excludes participation to otherwise post a security deposit or purchase insurance.
7. While using cash or other financial instruments as a collective deposit by the Fund is not problematic if an individual self-insured employer becomes insolvent, it is problematic if the Fund itself becomes insolvent. In that event, a bankruptcy court may attach the cash and financial instruments as assets of the Fund, and the director would be one of many in line with other creditors with higher priority over the assets. As a result, the amount of money to pay workers’ benefits could be greatly diminished from the amount necessary to cover all the debts. We suggest that the bill provide assurances that all the money necessary to cover the incurred workers’ compensation liabilities be protected from other creditors in the event the Fund becomes insolvent.
8. The bill does not clearly distinguish between the role of the director and the Fund. Example: the director determines full or partial participation (no criteria specified) in section 4(1)(a). The Fund has a separate process under section 4(7)(b), and an employer that is not designated as a fully or

partially participating member has to follow the rules of the director and the Fund under section (4)(1)(d).

9. The bill allows the director to enforce provisions related to the Fund's day-to-day management of the Fund, which may not necessarily be established in administrative rule or law. Enforcing contracts and shareholder derivative actions are not common enforcement and collection functions of the director's oversight responsibilities. The director is charged with the administration, enforcement and regulation of the workers' compensation law, which does not include enforcing by-laws or contracts of system participants. We suggest modifying the bill to allow the Fund to assume the responsibility for its management through administrative proceedings.
10. Self-insured employers may be subject to unreasonable requirements under the bill. If the director rejects the composite deposit proposed by the Fund, then each member must either post an individual security deposit or purchase insurance. The bill states that the Fund must return the deposit assessments to the employers for the year the composite deposit is rejected. The Fund is required to refund any deposits paid by members if the members post individual security with the director. If the next year, the director approves the composite deposit, it is unclear what happens to the individual security deposits and the liabilities incurred during that year. It seems more practical to provide that the Fund is responsible for meeting the obligation and securing the liabilities under a previously approved composite deposit until the Fund propose another composite deposit. All participating self-insured employers are exempted from paying the premium assessment (Self-Insured Employer Adjustment Reserve assessment). The director would not have sufficient reserves on hand to pay the claims of self-insured employers that defaulted in the prior year. It is not clear whether the Fund would remain responsible for paying those liabilities.
11. In conversations with the proponents of the bill, the director understood that the Fund would assume responsibility for any and all self-insured employers, whether excluded from participation or not. The bill is not clear whether the claims processing and benefit obligations of public entities and self-insured groups will be processed and paid by the Fund.
12. Current law allows an employer who is no longer self-insured to leave its individual security deposit posted with the director for at least 62 months, or purchase a policy of paid-up insurance that includes coverage for the liabilities during the period of self-insurance. The bill requires an employer that is no longer self-insured to secure the payment of workers' compensation benefits that accrued during the period of self-insurance. The provisions appear to be inconsistent, and clarification should be explicit in the statute.
13. The bill provides that the Fund collect an annual deposit assessment. It would be prudent to allow the Fund to assess members at any time necessary to executive its obligations under the bill.
14. The director recommends the Fund provide quarterly performance audits of the fund balance and investment performance, in addition to the annual composite deposit requirement.

Fiscal Impact to DCBS: The bill assigns new oversight and administrative duties to the director. The bill provides that the Fund may receive confidential information about the financial condition on each member self-insured employer, and allows the Fund to have access to the annual reports and other financial information submitted to the director whether the self-insured employer is a member of the Fund (i.e., public entities and self-insured employer groups). The director must establish new procedures and allocate personnel to provide the information to the Fund. The bill creates new types of penalties to be assessed against self-insured employers, and requires the payment and enforcement of some types of penalties to be collected by the director and transferred to the Fund. The bill assigns the responsibility to review the proposed composite deposit that can include financial instruments other than traditional risk transfer instruments (e.g., excess insurance or irrevocable letters of credit). If the director is expected to conduct this financial review in-house, there will be additional expenses to hire financial analysts to conduct that review. The director must continuously monitor the financial condition of all

self-insured employers that are members of the Fund, and report to the Fund the name of any self-insured employer member who may not meet the financial requirements of the Fund. While the bill adds additional responsibilities, it does not eliminate any current responsibilities relating to the self-insurance program. As a result of the staff reduction and the additional duties presented in the bill, the agency will have to add staff to perform the work. As currently drafted, the bill does not identify a funding source for the additional workload requirements. Barring any specificity, it is assumed that the Premium Assessment Operating Account would be the source of those funds, currently funded by all employers (not just self-insured employers).

Other Economic Impact: Self-insured employers who are required to become members of the Fund will experience an economic impact. However, because the security mechanisms necessary to ensure workers benefits are protected during transition, it is not possible to determine the extent of the initial savings or additional costs employers will experience. In addition, the bill does not provide pricing mechanisms for participating employers. It is possible that small, local employers will experience a negative impact, while large companies may realize a positive economic impact.

Support: Oregon Self-Insured Association

Opposition: Unknown

Prepared by: Kevin Willingham, Deputy Administrator, Workers' Compensation Division (503) 947-7501.