BUREAU OF INSURANCE
BASIS STATEMENT AND SUMMARY OF COMMENTS
PROVISIONAL ADOPTION OF 02-031 C.M.R. CHAPTER 255
WORKERS' COMPENSATION FRONTING COMPANIES

Acting Superintendent of Insurance Timothy N. Schott hereby provisionally adopts Rule Chapter 255, "Workers' Compensation Fronting Companies," pursuant to 5 M.R.S. § 8072(1), 24-A M.R.S. § 212, and 39-A M.R.S. § 403(4 B)(D). The purpose of the Proposed Rule is to establish the terms and conditions for the implementation of group self-insurance fronting arrangements and the formation, operation, and dissolution of workers' compensation fronting companies.

On November 28, 2023, the Bureau published a Notice of Rulemaking setting the public hearing at 10:00 a.m. on December 27, 2023. The public hearing took place as scheduled, and the comment period closed at 4:30 p.m. on January 8, 2024.

The rule is hereby adopted as proposed, subject to the changes discussed below in response to the comments and a few non-substantive editorial corrections.

Comments

There were no comments at the hearing. One timely written comment was received, submitted by Bruce C. Gerrity, Esq., of Preti, Flaherty, Beliveau & Pachios, Chartered, LLP, on behalf of the following organizations (collectively, "DR"):

Dirigo Re, a self-insured reinsurance account
Construction Group Trust
Distributors and Suppliers Group Trust
Forest Products Group Trust
The Greater Portland V
Maine State Group
Manufacturers of Maine Group Trust
Maine Oil Dealers
Social Services & Education Group Trust

Summary of Comments and Bureau of Insurance Responses

General Comments

Comment: DR began its letter by citing Maine's long and successful history with workers' compensation self-insurance dating back to the 1980s, and the benefits a well-run and well-regulated self-insurance program can bring to employers and employees alike. DR noted that Maine has been an innovator throughout that time, citing the Maine Self-Insurance Guarantee Association, group self-insurance programs, and self-insurance reinsurance accounts: "In each instance the legislative goal was to develop opportunities to provide quality protection for Maine business employees and at the same time create opportunities to provide less costly coverage." The fronting company law was proposed for the same purpose, because currently, Maine employers' out-of-state risks must be insured through a licensed insurance carrier, adding what DR views as substantial and unnecessary costs. DR asserts further that the reason it is still necessary to obtain costly commercial insurance coverage because "efforts to create an opportunity to self-insure out of state employees of Maine employers have failed under Maine law as interpreted by the Bureau."

Bureau Response: We agree that there is a problem that would benefit from an innovative and workable solution. The history of Dirigo Re is instructive. It was created because group self-insurers felt that commercial reinsurers were overcharging because groups had nowhere else to turn for the catastrophic coverage they needed. By extending the group self-insurance concept to reinsurance, Maine self-insurers had a successful, cost-effective alternative. We supported this innovation, which now has more than a 20-year history of operation. Members of Maine group self-insurers face a similar problem with their out-of-state risks. Almost no states other than Maine recognize Maine group self-insurance as valid workers' compensation coverage. In those states, the employer's only options, under current law, are to buy a policy in the traditional insurance market (or if necessary, in the state's residual market which is even more expensive), or to negotiate a "fronting arrangement" with a licensed insurer under which the insurer agrees to issue the employer a policy which is reinsured by the group self-insurer; the insurer cedes most of the premium back to the group as compensation for assuming the risk, but retains a percentage as a "fronting fee." Employers contend that the fronting fees are unreasonably high and that more cost-effective alternatives should be available.

Where we respectfully disagree with DR is their claim that the Bureau is somehow responsible for their inability to self-insure their out-of-state risks. Within the limits of what Maine can do unilaterally, we have worked hard to support them, and to take innovative measures. Nothing in Maine's self-insurance laws explicitly authorizes Maine group self-insurers to assume out-of-state exposures. Nevertheless, we have agreed with DR and other Maine groups that because the law is silent on this matter, the assumption of out-of-state exposure is likewise not prohibited. Accordingly, we have authorized group self-insurers to assume reinsurance, and we have supported their efforts to become authorized in other states to provide coverage directly.

The difference between catastrophic reinsurance coverage and coverage for out-of-state risks, however, is that Maine can solve the reinsurance problem unilaterally. The catastrophic reinsurance coverage an individual or group self-insurer can purchase in the commercial market is regulated entirely under Maine law, and an alternative risk transfer vehicle such as Dirigo Re can likewise by created and regulated entirely under Maine law. No such unilateral solution is available for out-of-state risks, because each state has the power to enact its own workers' compensation laws and to determine the coverage requirements for employers doing business in that state, even if that employer is headquartered in Maine and belongs to a financially strong group self-insurer organized under Maine law. Maine has already authorized its group members to self-insure their exposure in other states, but that authorization is only valid to the extent that the other state chooses to recognize it as sufficient to comply with that state's own laws.

Comment: DR asserts that the Proposed Rule disregards the principle that a fronting company as contemplated by the statute is "a distinct entity that stands on its own,"[1] and that as a result, the Proposed Rule is overbroad, burdensome, and imposes inappropriate requirements.

Bureau Response: At the legislative hearings and work sessions, Dirigo Re emphasized that a fronting company as contemplated by their legislative proposal was merely a legal framework through which Maine group self-insurers could cover risks in states where the group was unable to obtain authorization to provide coverage directly. They proposed that fronting companies be regulated under the Workers' Compensation Act rather than the Insurance Code because they were, in substance, self-insurance arrangements rather than separate business entities in their own right. They asserted that substantial capital requirements are unnecessary because the fronting company's resources are the net worth of the participating groups' member employers. Under 39-A M.R.S. § 403(4-B)(A)(1), a fronting company is a pass-through entity that cedes all of its premium and exposure to the group self-insurers with which it enters into fronting arrangements. A fronting company established in this manner is inseparable from its participating group self-insurers and cannot stand on its own.

Comment: DR added that the fronting company law was proposed "in an innovative spirit," and in their view, the Proposed Rule "does not embrace the spirit of LD 1372, but rather places numerous ill-advised and unnecessary conditions on the authorization of a fronting company which manifest an obdurate opposition to the concept."

Bureau Response: Although we opposed the bill, we worked diligently once it was enacted to develop the most workable framework we could envision for the implementation of the fronting company concept as we understood it. Because the fronting company concept is so novel, there are no established models to emulate. The bureau must rely upon the enacting statute and staff's professional judgment in establishing appropriate parameters to allow the implementation of a fronting arrangement that includes adequate financial safeguards.

Comment: DR objects to numerous requirements in the rule on the ground that the statute does not require them.

Bureau Response: One of the principal purposes of rulemaking is to address issues that are not clearly and definitively resolved by the statute. In some cases, our response to the comments explains the reasons why the requirements DR has questioned are clearly delineated or reasonably implied by the statute. In other cases, we agree with DR that the

[1] The quoted wording appears in their comment on Section 5(2)(I). Substantially similar language appears in their comments on Section 4(2) and on the introduction to Section 5(2),

statute is silent on the issue addressed by the rule, and our response to the comments explains why it is important to resolve the issue.

Section 3(5), definition of general expenses

Comment: The rule defines "general expenses" to mean expenses that are the undivided obligation of the fronting company rather than the direct responsibility of a particular participating group. DR objects that "It is not clear what 'undivided obligation' means, especially if all obligations are retroceded to another party."

Bureau Response: We agree with DR that all of the fronting company's obligations must be ceded to participating groups, and for claims and loss adjustment expenses, it is easy to identify one participating group that should bear sole responsibility. But what about license fees, and fees for consultants rendering services to the fronting company as an entity? There needs to be some sort of process for allocating these expenses among participating groups, and some process for administering and enforcing that allocation process. We have attempted to leave as many of the details as possible to the fronting company in its own plan of operation, but we need provisions in the rule outlining what the fronting company needs to do, and it is useful to have a term to identify the subject matter of these provisions. That is why we have defined the term "general expenses." This is only a definition, and all that a definition can ever do is to explain what a particular term does or does not mean. With the exception of Section 6(3)(A)(3), discussed separately below, DR did not object to any of the substantive provisions that use this defined term, and DR has not suggested any changes to the definition.

Comment: DR also objects to the provision clarifying that expenses calculated as a percentage of premium are considered general expenses unless the counterparty has agreed to bill each participating group separately for its *pro rata* share. DR asserts that "It is not the place of the State of Maine to place conditions on another state as to how it calculates any of its statutory obligations or to require a coverage state to agree to "bill each participating group separately for its pro rata share."

Bureau Response: We agree that it would be improper to impose such conditions. That is precisely why there need to be provisions addressing the different possible ways the fronting company might be billed. If the obligation is allocated among multiple participating groups, we cannot require the billing party to make arrangements to send multiple bills to each group and pursue separate collection efforts if the group fails to make a timely payment in full. If the bill needs to be paid centrally and allocated "under the hood" within the fronting company, then that bill needs to be subject to the provisions of the rule and the plan of operation, relating to the central payment of general expenses, even if the allocation itself is straightforward because the underlying charge is a percentage of premium.

Section 4(2), business activities of fronting companies

Comment: As proposed, this subsection would have required a fronting company's business to "be limited to the issuance and administration of workers' compensation coverage through fronting arrangements, as approved by the Superintendent in accordance with this rule." DR objects to what they interpret as a requirement to obtain regulatory approval for each individual fronting arrangement.

Bureau Response: There was never any provision in the Proposed Rule requiring approval for each individual fronting arrangement. To the contrary, the rule specifically provides for the review and approval of template language that a fronting company may use without the need for further transaction-by-transaction review. The intent of this subsection as proposed was to require the "issuance and administration of workers' compensation coverage through fronting arrangements." To avoid potentially ambiguous readings, the language of this subsection has been clarified as follows:

2. A fronting company's business must be limited to the issuance and administration of workers' compensation coverage through fronting arrangements, consistent with the requirements of this rule and the fronting company's plan of operation as approved by the Superintendent ~~in accordance with this rule~~.

Section 4(3), permitted ownership structure

Comment: As proposed, this subsection would have required a fronting company to "be wholly owned by its sponsoring reinsurance account or one or more of its member groups or former member groups, singly or in any combination." DR objects to this requirement, acknowledging that it "is the likely ownership format" but asserting that other structures are not precluded by the statute.

Bureau Response: 39-A M.R.S. § 403(4-B)(A)(2) provides that "A fronting company may be owned by one or more group self-insurers or by a group self-insurance reinsurance account." While this sentence is worded permissively, it appears to provide a choice between two options. We are not necessarily opposed to other ownership models, but other models would require a statutory amendment.

Comment: DR also objects to the prohibition against recognizing the value of an ownership interest in a fronting company in determining distribution of surplus of a group self-insurer or reinsurance account, observing that "the statute does not preclude" this practice.

Bureau Response: Although it is true that the statute does not expressly preclude this practice, it also does not expressly allow it. Because the statute is silent on this point, it is appropriate for the rule to clarify it. The ownership of a fronting company is separate from the primary activities of a group self-insurer or reinsurance account. Stock or membership interest in a fronting company cannot be used or readily liquidated to pay claims.

Therefore, it is inappropriate to consider the value of the fronting company when evaluating the resources available to pay claims.

Section 4(4), notice that a fronting company is not a licensed insurer

Comment: This subsection provides that "A fronting company's legal name or business name may not be deceptive or misleading," and continues by prohibiting a fronting company from adopting a name that "includes the word 'insurance' or otherwise implies that the fronting company is an insurer, unless its letterhead and other materials using that name include a disclaimer that the company is not licensed as an insurer in Maine." DR objects to this requirement, saying it goes beyond the requirements of the statute.

Bureau Response: Although DR requested the deletion of this entire subsection, we do not understand them to be objecting to the general prohibition against using deceptive or misleading names. Ordinarily, we would not permit any entity that is not licensed as an insurer to hold itself out to be an insurer in Maine. As DR notes, however, a fronting company might be licensed as an insurer in other states. This is why we did not categorically prohibit a fronting company calling itself an insurer, as long as it makes clear that it is not licensed as an insurer in its home state.

Comment: DR also objects to the proposed requirement that the disclaimer identify any coverage states in which the fronting company is not licensed as an insurer, asserting that it "is burdensome and makes no sense for a fronting company to advise the world of states in which it does not operate," and Maine should not be setting the disclosure requirements relating to activities in other states.

Bureau Response: This sentence would only have applied if the company holds itself out to be an insurance company, and would only have required the company to identify "coverage states in which the fronting company is not licensed as an insurer." A coverage state, by definition, is a state in which the company does operate, so this has nothing to do with advising the world of states in which it does not operate. However, we agree with DR that the coverage state should be free to set its own requirements regarding what is or is not considered a misleading business name in that state. Therefore, this subsection has been revised as follows:

4. A fronting company's legal name or business name may not be deceptive or misleading. If the name includes the word "insurance" or otherwise implies that the fronting company is an insurer, the fronting company's letterhead and other materials using that name must include a disclaimer that the company is not licensed as an insurer in Maine. ~~The disclaimer must also identify any coverage states in which the fronting company is not licensed as an insurer.~~

Section 5(2), contents of application

Comment: DR objects to the requirement that the application "must be submitted jointly by the proposed fronting company, the sponsoring reinsurance account, and one or more participating groups," because a fronting company in DR's view "is a stand-alone legal entity.... Under the statute a fronting company is a distinct entity. It is inappropriate to require that an application for approval include a sponsoring reinsurance account or participating groups, since they only come into play post approval."

Bureau Response: Although the fronting company is a distinct legal entity from the sponsoring reinsurance account and the participating groups, it cannot exist without them. Even if it were somehow possible for a fronting company to be formed without the involvement of a reinsurance account and at least one of its member groups that intends to participate in a fronting arrangement, it would be impossible for a shell company formed in that manner to present a meaningful application or a meaningful proposed plan of operation for the Superintendent's review.

Comment: DR also objects to a perceived assumption that "there is a separate fronting company for each fronting arrangement."

Bureau Response: We made no such assumption. It was our expectation that DR would only establish one fronting company, but that is no reason to prohibit other options. Indeed, the final paragraph of 39-A M.R.S. § 403(4-B)(B)(1), by stating that more than one group "may" enter into a fronting arrangement with the same fronting company, expressly contemplates the possibility that they may also work with different fronting companies.

Section 5(2)(F), business plan

Comment: DR asserts that "The requirement for a business plan is redundant and requires additional and unnecessary expense" and that the proposed Plan of Operation is sufficient. They characterize the language requiring "more detail 'to the extent not fully addressed in the Plan of Operation'" as unduly burdensome.

Bureau Response: We agree that if this information is already in the Plan of Operation, it need not be repeated in the business plan. That is why we have proposed and provisionally adopted language, as acknowledged above by DR, expressly providing that the business plan need only include the information required by Subparagraphs (1) through (6) to the extent that the information was not already provided in the business plan. To the extent that DR asserts that this information should not be required at all, we have addressed those in our responses to DR's comments on specific subparagraphs.

Section 5(2)(F)(1), initial coverage states

Comment: This subparagraph requires the business plan to include "The identities of the initial coverage state or states in which the company intends to do business, and a report on any communications the applicants have had with regulators in those states on the feasibility of approval in those states and the conditions that would be required for approval." DR objects to any requirement "to 'identify' an initial coverage state or states or report on its communications with them."

Bureau Response: Knowing where the company will be operating and what conditions will be required in those states would generally be critical elements in any business plan, and are useful in evaluating the company's expected exposure, whether it has made reasonable arrangements to manage that exposure, and whether additional capital is necessary. Nevertheless, in order to accommodate applicants that might be eager to commence the review process before they have decided on their initial coverage states, we have revised this subparagraph as follows:

(1) The identities, if known, of the initial coverage state or states in which the company intends to do business, and a report on any communications the applicants have had with regulators in those states on the feasibility of approval in those states and the conditions that would be required for approval;

Comment: 39-A M.R.S. § 403(4-B)(B)(2)(b)(ii) requires the Superintendent's review to consider "Whether the fronting company has received demonstrated interest from a regulatory agency in another jurisdiction to authorize the fronting company to provide workers' compensation insurance coverage in that jurisdiction." DR characterizes this as "a poison pill" that was "demanded ... by the Bureau," and asserts that it "creates an impregnable roadblock." As it is in the statute, however, the rule should identify this requirement as de minimis, and that the rule is to be liberally construed to promote independence by an applicant to advance, not impede approval.

Bureau Response: It is not clear what DR means by language "demanded" by the Bureau. The Bureau opposed the bill presented by DR for a variety of reasons which were expressed to the committee. This included a concern that it was premature to enact "fronting company" legislation or design a plan of operation, for the sole purpose of satisfying the workers' compensation coverage requirements of other states, before we knew whether there was a single state that would approve a fronting company in any form at all, or what form that state would want the fronting company to take. However, the purpose of developing this rule, including the consideration of comments, is to try to implement the statute in the most workable way.

It is not clear how the specific language the Legislature enacted, which merely requires the Bureau to "consider" whether there is demonstrated interest, would be an "impregnable roadblock" for the fronting company, especially since is difficult to envision how a fronting company could operate effectively without such interest. We do not assume that DR intends to operate a fronting arrangement in another state without complete disclosure and approval of that other state's regulators. However, we have revised this subparagraph to allow a little more flexibility.

Section 5(2)(F)(3), identities of service providers and process for selecting them

Comment: This subparagraph, as proposed, would have required the business plan to include the "process for selecting service providers, and the identities of all service providers that have been selected at the time of the application." DR objected that "In many instances a fronting company may not actually engage service providers but utilize the service providers of a group or reinsurance account," and expressed a further concern that "requiring that the 'identities of all service providers at the time of the application' be disclosed contemplates executed contracts before the company even exists."

Bureau Response: This subparagraph does not require disclosure at the time of the application of all service providers, as the comment suggests, but only those service providers that have already "been selected at the time of the application." As DR acknowledges, many service providers will already be in place if the fronting company relies on the service providers engaged by the participating groups or the sponsoring reinsurance account. If other service providers are needed, the fronting company might have already made arrangements with them as part of its preparation for the application process. It seems unlikely that the company will submit an application "before the company even exists."

Comment: DR objects: "The process for how the applicant will do business is part of its Plan of Operation. It need not be repeated.

Bureau Response: We understand this to be an objection that requiring the process for selecting service providers to be included in the business plan is redundant because Section 6(1)(E) already requires it to be included in the plan of operation. We agree, and have deleted that language. As revised, this subparagraph reads as follows:

(3) The ~~process for selecting service providers, and the~~ identities of all service providers that have been selected at the time of the application;

Section 5(2)(F)(4), identities of employees

Comment: As proposed, this subparagraph would have required the business plan to describe all personnel to be employed and all assets to be held outside the trust account, or to include a confirmation that there would be no direct employees or unrestricted assets. As provisionally adopted, it has been split, in response to the comments, into two separate subparagraphs, with subparagraph (4) addressing only the fronting company's employees. DR objects to the requirement to disclose all personnel to be employed by the fronting company, acknowledging that "it is reasonable to identify incorporators and board members, along with accountants, attorneys and actuaries," but asserting that otherwise, this requirement is overbroad and burdensome."

Bureau Response: Based on our understanding of the statute and its purpose, we anticipated that most services would be provided by the participating groups or the sponsoring reinsurance account, and that even those services engaged directly by the fronting company, including those described in the comment, would be so limited in scope that they would likely be performed by independent third parties rather than by employees. However, we did not mean to prohibit other business models or make them unworkable, as long as there is sufficient disclosure to provide an adequate understanding of the fronting company's business plan. Therefore, this subparagraph has been revised to read as follows:

(4) ~~The identities of any employees of the fronting company and any assets to be held by the fronting company outside the trust account to be established pursuant to Section 6(3), or confirmation~~ Confirmation that the fronting company will have no employees of its own and no assets outside the trust account, or a hiring budget for the first five years of operation, including estimated payroll, the general responsibilities of the fronting company's employees, and the positions and projected salaries of the five highest-paid salaried employees, with their identities if known; ~~and~~

New Section 5(2)(F)(5), unrestricted assets

Comment: DR objects that "there is no statutory disclosure requirement on assets or disclosure of assets outside of the trust fund to be established," and that the proposed rule "is overbroad and burdensome" to the extent that it addresses more than the statutory capital requirements.

Bureau Response: Again, we had anticipated that the fronting company's own assets would be limited to the minimum required to meet statutory capital requirements and, if applicable, to pay general expenses not charged directly to participating groups. If the fronting company plans to be holding additional assets, this is a material element of the company's finances that needs to be understood by its regulator. Accordingly, the provisions of Proposed Subparagraph (4) addressing unrestricted assets have been moved into a new Subparagraph (5) and revised as follows:

(5) Confirmation that the fronting company will hold no assets outside the trust account to be established pursuant to Section 6(3), or a budget outlining the projected value of the assets to be held outside the trust account for the first five years of operation and describing the purposes for which those assets will be held; and

Section 5(2)(F)(6) (Proposed Section 5(2)(F)(5)), proposed requirement for *pro forma* financial statements

Comment: DR pointed out that there was a typographical error in the numbering of this paragraph, which as published was marked as a second Subparagraph (3). DR comments further: "Given the anticipated role and activity of a company that is retroceding

obligations to groups or a reinsurance account, pro forma financial statements for five years are unnecessary and, again, a roadblock. The only real information needed from a fronting company is that it has capital of $5,000,000 *[sic]*."

Bureau Response: We agree that traditional *pro forma* financial statements are not properly suited to the pass-through business model, so we have revised this paragraph as follows:

~~(3)~~ (6) ~~*Pro forma* financial statements~~ The fronting company's projected premium volume, claims, and expenses for the first five years of operation;

Section 5(2)(G), contracts with service providers

Comment: Referencing its previous comment on Proposed Section 5(2)(F)(3), DR asserted that it is impossible to identify the anticipated terms of contracts before they have been drafted, and inappropriate to require their disclosure because of the "possibility that the other party to any contract negotiation could discover such terms to a fronting company's detriment."

Bureau Response: If the filing contains trade secrets whose disclosure would harm the fronting company, we are obligated to hold them on a confidential basis. To reduce DR's concerns that a requirement to disclose contracts or proposed contracts would be overbroad and burdensome, we have revised this paragraph as follows to limit the required disclosure to contracts that are material to the fronting company's operations:

G. Copies of all contracts or proposed contracts with service providers, or a description of the anticipated terms to the extent that contracts have not yet been drafted. With the approval of the Superintendent, the applicants may also exclude contracts from the scope of this paragraph and Paragraph H if they meet approved criteria designed to identify contracts with no material impact on the fronting company's operations;

Section 5(2)(H), other contracts

Comment: DR commented that the scope of this paragraph was not clear and objected that it was "so broad that virtually any contract which relates in any way to the operation of the fronting company would be disclosed," citing a routine overnight delivery service contract as an example and asserting that such disclosure would serve no regulatory purpose.

Bureau Response: We agree that this provision is overbroad as drafted. It was not intended to capture routine contracts entered into by the designated administrator in its ordinary course of business, only contracts entered into directly by the fronting company, which we anticipate would be rare, and special arrangements made by the participating group or sponsoring reinsurance account which apply only to work performed on behalf of the fronting company. Accordingly, this paragraph has been revised as follows and, as

discussed above, has also been brought within the scope of the new *de minimis* exclusion that has been added to Paragraph G:

H. Copies of any contracts or proposed contracts, or a description of any anticipated contracts, that are not otherwise provided pursuant to this subsection and to which the fronting company is a party, or to which the sponsoring reinsurance account or a participating group is a party and which expressly relate to the operations of the fronting company;

Section 5(2)(I), guaranty from sponsoring reinsurance account

Comment: DR objects to the requirement to provide a copy of the unconditional financial guaranty executed by the sponsoring reinsurance account to satisfy the requirements of Section 8(1)(A).

Bureau Response: We understand DR's objection to be addressing the underlying requirement to execute a financial guaranty, not the requirement to include a copy in its application. Accordingly, we have summarized and addressed DR's comments under the heading of Section 8(1)(A).

Section 5(2)(L)(3), description of rating methodology

Comment: DR objects that the requirement to describe the rating methodology for fronting arrangements "conflates operation with application. DR assumes that the 'rating methodology' is that provided by its actuaries. The actual rating methodology will fall to the group or account actually assuming obligations and as such is already regulated by the Bureau. DR also anticipates that any rating methodology established by a Fellow would be generally acceptable to the Bureau. In addition, given joint and several liability this subsection should be deleted."

Bureau Response: Joint and several liability is not intended as a substitute for the use of a sound rating methodology, but as a backstop to protect against loss experience that was not foreseen by the rating methodology. An understanding of that methodology is essential in order to understand the exposure the fronting company has incurred and its procedures for managing that exposure. As DR suggests, we would expect (though we do not require) that unless the coverage state requires a different rating methodology, the fronting company's rating methodology would probably be based on the methodology normally used by the participating group for the risks it covers directly within the State of Maine, with modifications to reflect factors such as differences in laws in the coverage state, differences in expenses between direct and fronted coverage, and any provisions the group establishes to allocate costs and risks between employers with interstate and intrastate operations. If the rating methodology is a modified version of the group's usual rating methodology, a description of the modifications will suffice.

Section 5(2)(M)(1), amendments to sponsoring reinsurance account's plan of operation

Comment: DR objects that "It is not clear what is meant by 'proposed amendments to procedure[s] for oversight of the fronting company.'"

Bureau Response: That is not what the Proposed Rule says. This subparagraph requires the submissions of "Proposed amendments, as necessary for compliance with this rule ... To the sponsoring reinsurance account's plan of operation, including *[inter alia]* procedures for oversight of the fronting company." It is the account's plan of operation that is being amended, and oversight of the fronting company is one topic where amendments might be necessary.

Section 5(4), standards for approval

Comment: DR submitted extensive comments that were labeled as comments on Section 5(2)(M)(4) and two (nonexistent) clauses within that subparagraph, but it was clear from the context that the comment was actually addressed to Section 5(4) and its Paragraphs A and D. Section 5(4) delineates the standards for approval and disapproval of a fronting company application, and in addition to multiple point-by-point objections addressed separately below, DR urged that this subsection be deleted in its entirety because "There already are numerous protections otherwise in place (minimum net worth, and joint and several liability for example)."

Bureau Response: This is consistent with DR's other comments that the approval process should be limited to determining that the minimum capital requirements are satisfied. We disagree, and we do not believe that is the approval process the Legislature contemplated. Although the operations of a fronting company are simpler than those of a traditional insurer, there is more to the successful creation and operation of a fronting company than simply opening a bank account and depositing half a million dollars. Furthermore, deleting this subsection would remove the presumption of approval set forth in this subsection, which is not spelled out in the statute but was included because we understood it to be the legislative intent.

Comment: This subsection begins with a requirement that the Superintendent "shall approve the application, subject to such conditions as the Superintendent reasonably determines to be necessary for the safe and successful operation of the fronting company," if the requirements of the subsection are satisfied and the Superintendent does not find that the operations of the fronting company would likely be hazardous to employers, employees, or the public. DR began its comments by stating: "The Superintendent approves the application as long as it is reasonably *(DR's emphasis)* determined to be necessary for safe and successful operation."

Bureau Response: It is not clear whether DR was simply introducing its comments on this paragraph by paraphrasing the language of the rule, or whether DR was asking us to delete the language referring to "such conditions as the Superintendent reasonably determines to

be necessary for the safe and successful operation of the fronting company." Conditional approval is an important tool in the regulatory repertoire, and is a particularly important option to retain when reviewing a novel and experimental project such as a fronting company established under 39-A M.R.S. § 403(3-B).

Comment: DR objected to the provision directing the Superintendent to determine whether the fronting company has submitted a viable business plan, asserting that "any information should be in the Plan of Operation, not a business plan. That requirement should be liberally construed."

Bureau Response: A plan of operation is one of the fronting company's governing documents. A business plan outlines the company's goals, strategies, and expectations over a particular period of time. While there could be overlap, we have sought, as discussed in response to the comments on Section 5(F) and its subparagraphs, to eliminate redundant or unnecessary requirements, and we appreciate the comments calling our attention to provisions that should be deleted or modified. It is not clear what DR means when they say "that requirement should be liberally construed." If it means that the Bureau's review of a proposed company's business plan prepared by the company's management for the company's purposes, and respecting their consideration of choices among business options should be reasonable, we agree.

Comment: DR objected to the requirement that the company have a viable business plan "for successful operations in compliance with ... applicable laws in Maine and the various coverage states" on the ground that "the superintendent cannot reach into the laws of another state which may be interested in approving a fronting company.... Also, it is not the superintendent's place to make a determination as to what 'applicable laws …' in 'the various coverage states' means and the Superintendent does not have authority to make evaluations of the laws in any coverage states, any more than the Bureau would tolerate another state making determinations about the reasonableness of Maine's laws."

Bureau Response: It is the fronting company that has the obligation to understand and comply with the laws of the states in which it does business. Nothing in this rule involves an evaluation of whether or not those laws are reasonable. The fronting company must take those laws as it finds them, and so must the Superintendent. We agree that those laws are beyond our reach, and if there is any question about the applicability or interpretation of those laws, we will consult with the other state so that we can obtain a definitive answer.

Comment: Also, the phrase "applicable laws in Maine" does not clarify that title 24-A is not applicable as a general matter; that point should be stated in the rule.

Bureau Response: The rule does not need to spell out each and every law that does not apply to a fronting company. 39-A M.R.S. § 403(4-B)(C) unambiguously declares that

"The provisions of Title 24-A and rules adopted under that Title relating to the formation, review, approval and operation of a workers' compensation insurance company do not apply to a fronting company established under this subsection except to the extent that those provisions and rules are consistent with the requirements of this subsection and any rules adopted pursuant to paragraph D." A fronting company is not an insurance carrier of any kind within the meaning of Title 24-A, and nothing in this rule purports to regulate a fronting company as an insurance carrier. Only two provisions of the Insurance Code are incorporated by reference in this rule. One is 24-A M.R.S. § 12-A, which specifies the Superintendent's enforcement powers against "any person" under the Insurance Code "or any other law enforced by the Superintendent," which has always primarily applied to the self-insurance provisions of the Workers' Compensation Act, currently codified at 39-A M.R.S. § 403. The other is 24-A M.R.S. § 216(5), which governs the sharing of confidential regulatory information and which applies to the Superintendent, not to the fronting company.

Comment: DR objects: "The provision that the superintendent must find that the operations of the company would not be hazardous to employers, employees, or the public once again reaches into the purview of another state."

Bureau Response: While each coverage state is responsible for the fronting company's operations within that state, the Superintendent is responsible for the solvency and soundness of the fronting company as a whole. We are the regulator best-positioned to monitor how the moving parts fit together nationwide. Furthermore, we have not only the authority but the responsibility to ensure that Maine-based companies do not create hazards in other states, and to ensure that exposures in other states do not endanger the Maine self-insurance groups that must guarantee the solvency of the fronting company.

Comment: Finally, DR asserts that "the words 'would likely be hazardous to employers, employees, and the public' are so vague as to have no meaning. Why would an arrangement be hazardous to an insured employer? Why would an employee of an insured employer be placed in a hazardous condition? What elements of the public would be placed in a hazardous condition?"

Bureau Response: As DR noted in their introductory comments, Maine has a long history of successful self-insurance operations, and innovations that have evolved into institutions. One of the biggest reasons for this success is that neither self-insurers nor regulators have approached the risks with the attitude that nothing can possibly go wrong, but instead have worked diligently and proactively to identify potential hazards, to prevent them when possible, and to mitigate them when prevention is not possible.

Section 5(4)(A), impact on Bureau's accreditation

Comment: DR contends that accreditation is no longer a concern because the Bureau has already been accredited for a five-year term ending in the fall of 2028.

Bureau Response: This comment misconstrues the nature of the accreditation process. It is not an open-ended approval for states to do whatever they want between now and 2028 without regard to ongoing compliance with the standards. As DR observes, the Bureau was recently reaccredited, and this process included full disclosure of the amendments to 39-A M.R.S. § 403. However, 39-A M.R.S. § 403(4-B)(B)(2)(b)(i) requires consideration of the Bureau's accreditation as a factor in the approval process, in case an adverse impact does occur despite current expectations.

Comment: DR cross-references this paragraph in its comments on Section 10(2)(B), asserting that their rationale for requesting deletion of Section 10(2)(B) also calls for deletion of Section 5(4)(A).

Bureau Response: See response to comments on Section 10(2)(B),

Comment: Finally, DR requests: "If the Bureau cites concerns arising out of Maine's compliance with NAIC financial accreditation standards, it should disclose to any fronting company what the concerns are and all communications of any nature it has had with the NAIC."

Bureau Response: The open-ended request that the Bureau disclose "all communications of any nature it has had with the NAIC," which would require the Bureau to violate Maine's confidentiality laws, does not appear to be responsive to anything proposed in the rule. However, the Bureau intends to continue to comply with our legal obligations under this rule and the Administrative Procedure Act. We will also continue our efforts to be collaborative in the enactment of the statute.

Section (5)(4)(B), consideration of conditions other states would impose

Comment: DR objects to considering, as part of the application review process, the conditions regulators in other states would impose on the fronting company's operations in their respective jurisdictions. DR asserts that this would only be relevant "if the Bureau were to take the position that it could deny an application to become a fronting company based upon inadequacy of the laws of another state." This was included in DR's comments on Paragraph D, below, but we believe it was intended as a comment on Paragraph B.

Bureau Response: We agree with DR that we cannot regulate the conditions to be imposed by other states. The issue is not whether or not the other state's laws are adequate, but how the need to comply with those laws affects the fronting company as a whole. Other

states are responsible for establishing, enforcing, and interpreting their own laws, but Maine is responsible for the solvency and sound operation of the fronting company as a whole, so we must be aware of the conditions under which the company operates and the company's ability to operate under those conditions. For example, if the company chooses to apply for licensure in a state that will require it to post a special deposit, the company must take measures to ensure that adequate resources are available to support its operations in other states.

Comment: DR adds that if this requirement is retained, "the rule should specifically find the other state's laws are lacking and why. The Bureau should advise any such state and a fronting company in writing of such reasons."

Bureau Response: As noted above, this does not amount to a "finding that the other state's laws are lacking." We fully agree that if the conditions of approval in other states pose an obstacle to the fronting company's approval in Maine, there should be full communication and an opportunity to remedy the problem. More generally, we agree that if an application is denied for any reason, there must be a clear and reasoned explanation, sufficient to withstand judicial review, of the reasons for the denial.

Section (5)(4)(D), preparation for adverse loss development and other material risks

Comment: DR asserts that to the extent that the potential for adverse loss development relates to conditions in other states, it is "outside the scope of the authority of the superintendent."

Bureau Response: As discussed in our response to similar comments on Section 5(4), the Superintendent, as the fronting company's domiciliary regulator, is the regulator who is responsible for the overall solvency and soundness of the fronting company. If conditions in another state imperil the financial condition of the fronting company, this affects all the states where the fronting company operates, and it would also have repercussions – potentially serious repercussions – for the participating groups and their member employers in Maine.

Comment: DR asserts more generally that "Adverse loss development will be in a group or reinsurance account's actuarial fundings, so this proposal is unnecessary and burdensome."

Bureau Response: This paragraph calls for consideration of the applicants' "preparedness for adverse loss development." Once adverse development shows up in the actuarial findings, it has already occurred, and if the fronting company, reinsurance account, and participating group were not prepared for the possibility, it is too late.

Comment: Finally, DR objects to the consideration of" other material risks," noting that the term is undefined.

Bureau Response: We cannot anticipate all the issues that might arise during the review of a particular application. If we identify a material risk, we will disclose it promptly and work collaboratively with the applicants to find ways to mitigate it. A disapproval of an application due to unpreparedness for a material risk would never withstand judicial review if the Bureau did not identify the risk and the evidence that the applicants were unable or unwilling to prepare for it.

Section 6(1(A), role of sponsoring reinsurance account in plan of operation

Comment: DR objects to the requirement for the plan of operation to designate the sponsoring reinsurance account and specify "its rights and responsibilities, including the assessment of its member groups to provide funding to cover deficits," asserting that this is unnecessary because "These obligations already exist through §403(4) and (4-A)."

Bureau Response: While it is true that there is currently only one entity that is eligible to be a sponsoring reinsurance account, we cannot take for granted that this will always be the case, and even if it were, the role of Dirigo Re is so fundamental that it ought to be identified in the plan of operation. Furthermore, 39-A M.R.S. § 403(4-B) provides considerable flexibility how responsibilities may be allocated among the sponsoring reinsurance account and the participating groups, so these matters need to be addressed in the plan of operation.

Section 6(1)(C), procedures for entering and withdrawing from coverage states

Comment: DR objects that the plan of operation should not address the procedures for applying for approval to do business in a new coverage state, and for withdrawing from a coverage state, asserting that these are established by the state and not the fronting company.

Bureau Response: The state establishes the requirements, but the fronting company makes the decision whether to seek to enter or leave a particular state, and the decision how to proceed with the necessary applications. Those procedures need to be in the plan of operation.

Section 6(1)(F), provisions for surplus trust account

Comment: This paragraph requires the plan of operation to include provisions establishing and administering the surplus trust account maintained under Section 6(3). DR objects to this provision because it objects to the underlying trust account requirement, as discussed more fully below.

Bureau Response: See responses to comments on Section 6(3). Because the trust account requirement has been retained in the provisionally adopted rule, the requirement to address it in the plan of operation has likewise been retained.

Comment: 39-A M.R.S. § 403(4-B)(B)(1) requires the obligations assumed by a participating group from a fronting company to "be included in the actuarial analysis of the group and such other filings as the superintendent may require under this section." DR objects to "Any effort to boot strap the clause 'such other filings as the superintendent may require under this section'" and asserts that "Reliance on 39-A MRS § 4-B(B)(1) would be an overreach under the statute."

Bureau Response: We are not relying on the requirement to file the plan of operation for review as the statutory authority for imposing any substantive requirements on the operations of the fronting company. Furthermore, the plan of operation is not even within scope of the experience reporting requirements of Section 403(4-B)(B)(1): that is not the nature of the plan's contents, and the plan must already be filed and approved before there is any experience to report.

Section 6(1)(I), procedures for dividends

Comment: DR objects to addressing the potential payment of dividends in the fronting company's plan of operation, asserting that once dividends are approved by the Bureau "the process and/or allocation of dividends thereafter, be it to owners of a fronting company or members of a group, is within the purview of the parties, not the Bureau."

Bureau Response: We agree that the matter is within the purview of the parties. The plan of operation is subject to regulatory review, but ultimately it is created by and for the parties and we will approve any reasonable procedures the parties have devised and agreed to. However, the fact that a matter is within the purview of the parties does not mean that it should be addressed on some informal, *ad hoc* basis without any formalized procedures established in advance.

Comment: DR adds that further, "this provision is unnecessary and burdensome. Any obligation will already have been retroceded to a group or reinsurance account, including obligations to pay ongoing claims."

Bureau Response: We do not understand the relevance of the cession of claims to the participating group. We would not expect the fronting company to request a dividend payment to be made from funds needed to pay claims or other obligations.

Section 6(1)(L), enforcement procedures

Comment: DR objects to the language requiring the plan of operation to include procedures for enforcing the obligations of member groups that are not participating groups, asserting that any such group's "obligations would be limited to any contractual obligations between that group and any reinsurance account as to which it may be a member" and therefore have no place in the fronting company's plan of operation.

Bureau Response: That is not the case. Each member group, whether or not it participates in fronting arrangements, has a statutory obligation to the fronting company under 39-A M.R.S. § 403(4-B)(B)(1)(a).

Section 6(3), surplus trust account

Comment: In its comments above on Section 6(1)(F), the requirement to address the surplus trust in the plan of operation, DR objects that it "does not understand the reason behind a 'surplus trust account.' It is not referenced in the statute.... A trust account exists to secure funds for coverage. Such a trust account pays claims to the extent the fronting company has ceded exposures and administrative and claims expenses back to the policy holder. Any excess monies (surplus) of the fronting company should not be and is not required to be held in trust in any way. Creating a secondary trust is burdensome, unnecessary, beyond the scope of the statute, and ties up assets to no good purpose."

Bureau Response: In the Proposed Rule, we sought to implement the paradigm proposed by DR to the best of our understanding. DR asserted, when proposing the fronting company concept to the Legislature, that traditional insurance capital requirements are not designed for pass-through vehicles such as fronting companies as envisioned by 39-A M.R.S. § 403(4-B). They noted that substantially all of the financial strength of a fronting company is the aggregate net worth of the employers that participate in the groups that participate in the sponsoring reinsurance account. The role of the relatively nominal capital requirement, as described by DR in its legislative testimony, is to provide a backstop in the event that the premiums collected are insufficient to pay claims and expenses when due, with the anticipation that any shortfall will be remedied through subsequent assessments. Based on the Bureau's experience with group self-insurance, this seemed to be similar in concept to the trust account that group self-insurers maintain as collateral for their obligations, so we used that as our model. Because the company's surplus belongs to the company as a whole, we thought the trust account might also be useful as a central fund for payment of general expenses that are not the specific responsibility of a single participating group, and we included provisions designed to facilitate that option, but it is not a requirement and the fronting company is expressly permitted to provide in its business plan for some other arrangement of its own design for payment of general expenses. Because DR has not proposed any alternative, we have retained this provision in the provisionally adopted rule, but we are not necessarily opposed to a consideration of a different model through appropriate legislation.

Comment: The introductory paragraph of Section 6(3) includes language making the surplus trust account subject to the general requirements for group self-insurance trust accounts under 39-A M.R.S. § 403(9) and Bureau of Insurance Rule Chapter 250, "except as otherwise expressly provided in this rule or in the fronting company's approved plan of operation." DR objects that "The phrase 'except as otherwise expressly provided in this rule' should not be read to create or regulate a surplus trust account."

Bureau Response: The language requiring the creation of the trust account – "The fronting company's capital and surplus must be held in a trust account ...." – appears at the very beginning of this subsection, immediately preceding the clauses cited by DR. Although the language referencing 39-A M.R.S. § 403(9) and Chapter 250 does regulate the trust account, it only does so on a default basis, to the extent that the rule and plan of operation are silent. In particular, the exception quoted by DR permits the fronting company to override that default framework through the terms of its plan of operation , subject to the approval of the Superintendent, in any manner the fronting company considers appropriate.

Section 6(3)(A), capital requirements

Comment: DR objects that the capital requirement should not be phrased in terms of a minimum trust balance.

Bureau Response: See response to the overall objection to Section 6(3), above.

Section 6(3)(A)(3) and Section 6(3)(B)(1), reserve for general expenses

Comment: DR objects to the additional funding requirements that apply if the trust account is to be used for paying general expenses, noting in particular that "To the extent that the obligations of the fronting company are ceded to the policy holder *[sic]*, and the policy holder has sufficient funds to pay expenses, which the Bureau will know based on its regulation of groups or reinsurance accounts, there is no need to require additional monies be set aside for expenses."

Bureau Response: We believe DR means the participating group, not the policyholder, because the policyholder is the individual covered employer, whose obligation is to pay premiums and any necessary assessments, not to pay the fronting company's expenses on an ongoing basis. We agree that the fronting company should not be required to set aside additional funds in anticipation of those expenses that are the direct responsibility of the participating group. That is why this requirement only applies in cases where certain expenses, under the terms of the plan of operation, are the responsibility of the fronting company's general account rather than any participating group, and the fronting company chooses to channel those expenses through the surplus trust account rather than establishing some other mechanism in its plan of operation.

Section 6(3)(B)(3), payment of legally enforceable obligations

Comment: This subparagraph provides that a draw on the surplus trust is permissible "To pay any other legally enforceable obligation of the fronting company with the prior approval of the Superintendent." DR questions why the Superintendent's approval is required if the obligation is legally enforceable, noting that "The Superintendent might be concerned if a legally enforceable obligation could not be paid by the party ceded responsibility for payment of such obligations, but prior approval to pay them should not be required."

Bureau Response: If such a default occurs, the payment is likely to result in a breach of the minimum capital requirements, and in that scenario there would be a material risk that multiple legally enforceable obligations might collectively exceed the available funds. The Superintendent needs an active role in managing such situations to avert or mitigate a crisis.

Section 6(3)(D)(1), material risk of unremediated capital impairment

Comment: DR requested that this subparagraph "include the requirement that the superintendent 'reasonably' make a determination under this subsection" before assuming the trusteeship of the surplus account.

Bureau Response: We agree. This subparagraph has been revised as follows:

(1) The Superintendent reasonably determines that the trust's balance has fallen or is likely to fall below the minimum required by Paragraph A and that there is a material risk that the deficit will not be promptly remediated; or

Section 6(4), notice to member employers

Comment: DR objects that this subsection is unnecessary, asserting: "There is no need for each member group to provide notice to each member employer regarding operations of the fronting company. Each group is comprised *[sic]* of successful and sophisticated businesses. Each group has a board of trustees or directors which makes decisions for that group. Each board is elected by its members. Annual meetings are held. Employers are advised of important issues and developments. Each employer member of a group that would be obligated to pay such claims is already subject to that obligation by the joint several liability requirements and knows it."

Bureau Response: Sophisticated employers need notice too. We agree that these are employers with a tolerance for well-managed risk and are familiar with joint and several liability. However, when DR testified to the Legislature in 2023 that $1½ billion in joint and several liability would stand behind the innovative risk management vehicle they were proposing, it cannot be assumed that employers knew they had made this additional commitment when they joined their respective group self-insurers years or decades earlier.

If employers are advised "of important issues and developments," why is the obligation to guarantee the fronting company's liabilities not important enough to entitle the employer to advance notice? It is true that this is a contingent obligation that only comes into play if some other member group is unable to meet the obligations it has incurred as a participating group, but nothing prohibits the employer's group from incorporating this reassurance into the required notice.

Comment: DR adds that "the obligations of independent groups which are joining together to participate in a fronting arrangement will be determined by any contractual relationships between groups. As such, the requirements involving assessments against 'another member group' will not be subject to an overarching participation requirement that may not be applicable to any one group in any one circumstance."

Bureau Response: We agree that there need to be contractual agreements among the member groups because there is no self-evident allocation of assessments, especially for nonparticipating groups. That is why the subject needs to be addressed in the plan of operation.

Section 6(5)(A), agreement to cede all premiums to participating group

Comment: DR objects that "The presumption that 'all' premiums be ceded is overbroad. Section 6(5)(B) is overbroad and obligations of the parties will be defined by the contract."

Bureau Response: The presumption was established by legislation that DR drafted. 39-A M.R.S. § 403(4-B)(1) requires that the fronting company "cedes all of the premium ... of the policy for out-of-state employees to the self-insured group." We agree with DR that the "agreement" required by this paragraph is a contract, but DR does not explain why that should exempt it from regulatory review. It is central to the operations of the fronting company, and we cannot reasonably exercise our oversight responsibilities without understanding the terms of these agreements, including any unintended consequences we might be able to help the parties address during the review process.

Section 6(6), requirement to satisfy the laws of the coverage state

Comment: DR asserts that "Subsection 6 is overbroad in its entirety. It relates to regulators, laws, legislators, and requirements of another state. The superintendent cannot and should not make determinations as to the 'coverage sufficient to satisfy the laws of the coverage state.' It is for the legislature, administration, and regulator of another state to make such determinations."

Bureau Response: We agree that the respective coverage states establish their own requirements and that we have no power to make independent determinations whether those laws are satisfied. However, the sole purpose of a fronting company is to provide a

cost-effective way to enable Maine employers with interstate operations to meet their obligations in other states where they operate. If a fronting company fails to meet its obligations to its coverage states, it is also failing to meet its obligations to the State of Maine. Furthermore, because a fronting company's policies are subject to the laws of the coverage state, we do not have the power to authorize the issuance of policies that do not comply with those laws, and we have the responsibility not to facilitate actions that would violate those laws.

Section 6(6)(A), confirmation from regulator in coverage state

Comment: DR objects that "It is not for to the Bureau to make a determination as to what is a 'regulator with competent authority in each coverage state.' In fact, the requirement is a tacit statement that the Bureau does not, or should not, trust another state to have competent regulators. In fact, for example, in many states regulatory authority over self-insurance resides with a Department of Labor, not insurance."

Bureau Response: We agree that it is up to the coverage state to decide who has competent authority to regulate fronting arrangements covering risks in that state. That is precisely why we specify, generically, a "regulator with competent authority" rather than specifically requiring confirmation from an insurance regulator. Although 39-A M.R.S. § 403(4-B)(A)(1) specifies that a fronting arrangement involves the issuance of "a policy for workers' compensation insurance," we do not want to preclude the approval of a fronting arrangement under a state's self-insurance laws rather than its insurance laws. Insurance (including self-insurance) is regulated in the United States through a cooperative effort among the regulators of each jurisdiction. It is likely that whatever coverage arrangement might eventually be implemented will be regulated through some level of coordination by more than one jurisdiction.

Section 6(6)(A)(3), lack of Maine guaranty fund protection

Comment: This paragraph requires confirmation that the coverage state is aware that neither MSIGA nor MIGA will protect claimants under fronting arrangements. DR asserts that this is inappropriate because it is solely up to the coverage state to determine what information it chooses to require.

Bureau Response: There is no plausible justification for deliberately withholding potentially useful information from the coverage state. It is up to the coverage state to decide what to do with that information.

Comment: DR also cross-references its comment to Proposed Section 11(3), in which it asserts that Maine's guaranty funds do in fact provide coverage.

Bureau Response: See response to DR's comment on Proposed Section 11(3). To conform to the revisions we have made there, Section 6(6)(A)(3) has been revised as follows:

(3) Has confirmed that the coverage state is aware that as set forth in Section ~~11(3)~~ 11(4), claimants in the coverage state will not be protected by the Maine Self-Insurance Guarantee Association or the Maine Insurance Guaranty Association if the fronting company is liquidated or dissolved, and has provided an explanation satisfactory to the Superintendent about the protection, if any, that would be provided by the guaranty association in the coverage state; and

Section 6(6)(A)(4), no objection to terms of fronting arrangement

Comment: DR objects to this subparagraph, which prohibits a fronting arrangement from taking effect until the Superintendent has received confirmation that the applicable authorities in the coverage state have reviewed the terms of the fronting arrangement and do not object to them. DR asserts that "It is well beyond the pale for Maine to require another state to 'confirm' what it does and that it has done its job to the satisfaction of the Superintendent. It strains credulity that the Bureau seems to believe another state cannot interpret and discharge its own regulatory obligations."

Bureau Response: This is not about whether the other regulator has done its job, but about whether the fronting company has done its job. 39-A M.R.S. § 403(4-B)(B)(2)(e) prohibits a fronting company from issuing or providing workers' compensation coverage "until the fronting company receives prior approval in another jurisdiction." Because we cannot dictate the nature of another state's approval process, the rule provides that this statutory requirement may be satisfied through confirmation that the coverage state has received notice and does not object. The purpose of Section 6(6)(A), in general, is to ensure that there is adequate communication among the fronting company and its respective regulators.

Section 6(6)(B), cooperation with regulators in coverage states

Comment: This paragraph requires the Superintendent to "provide regulators in coverage states with all information reasonably necessary for their oversight of the fronting company's operations," provided that confidential information may only be provided under the protections required by 24-A M.R.S. § 216(5). DR objects to this requirement, asserting that it "again oversteps the authority of the Superintendent, reaching into the regulatory authority of another state. It is for a coverage state to determine what is reasonably necessary for that state's oversight of a fronting company's operations. In addition, this subsection has the distinct potential to create a bias in relation to the review by a coverage state."

Bureau Response: As noted in our response to the comments on Section 6(6)(A)(3), we agree that the other state has the power to determine what information is reasonably necessary. Once that state has made that determination and requested such information from the Superintendent, this paragraph directs the Superintendent to provide it, as long as the coverage state's regulator has the power to protect the information's confidentiality and agrees to do so. Even in the absence of any affirmative language in this rule, the Superintendent also has the inherent discretion to provide other regulators with additional information the Superintendent believes warrants their attention, subject as always to the laws establishing the terms under which confidential information may be shared. This is a fundamental principle of the state-based regulatory system. If a fronting company is concerned that the coverage state regulator might not have a complete and accurate picture, nothing prohibits the fronting company from providing whatever additional information the fronting company believes would be useful to clarify the situation.

Section 6(6)(C), additional provisions for compliance with coverage state requirements

Comment: This paragraph authorizes, but does not require, the Superintendent to establish additional requirements if "necessary to ensure the fronting company's compliance with the requirements of the respective coverage states," but requires that any such requirements may only be developed "in consultation with regulators in coverage states." DR objects that "Once again, it is inappropriate for the Bureau to inject itself into the regulatory processes and requirements of any coverage state."

Bureau Response: See responses to comments on Section 5(4) generally, Section 5(4)(B), Section 5(4)(D), Section 6(6) generally, Section 6(6)(A)(3), Section 6(6)(A)(4), and Section 6(6)(B).

Section 6(7), qualifications of service providers

Comment: This subsection requires all service providers to meet, at a minimum, the qualifications for comparable service providers for group self-insurers. DR "assumes that rather than meeting 'minimum standards,' any entity authorized as a third party administrator or meeting 'qualifications for comparable service providers' will be presumptively qualified under this subsection."

Bureau Response: We do not understand the distinction DR seems to be drawing between "meeting minimum standards" and being "presumptively qualified." If DR's statement of what it "assumes" is intended as a request for confirmation that a service provider meeting the minimum standards set forth in this rule is presumptively qualified, we agree with that interpretation.

Section 7(3), agreement that funds are held in fiduciary capacity

Comment: This subsection requires that if the fronting company delegates the collection of premiums to a commercial TPA or to the sponsoring reinsurance account, so that the premiums are not paid directly to the group, then the administrator that collects the premiums must execute an agreement acknowledging that the funds are the property of the group, are being held in a fiduciary capacity, and may only be expended for the purposes specified by this rule and the fronting company's plan of operation. DR's specific objection seems to be directed toward the reference to "the purposes specified by this rule and the fronting company's plan of operation" DR also reiterates its general objection that "Much of the rule is overbroad, burdensome, duplicative and otherwise unreasonable," and adds that this subsection "tolls in the inclusion of monies outside the trust fund dollars as to which DR has already commented."

Bureau Response: As already discussed several times, 39-A M.R.S. § 403(4-B)(A)(1) requires the fronting company to cede its entire premium from each fronting arrangement to the participating group. This subsection establishes the requirements that apply when that premium is actually collected by some entity other than the participating group. DR has not explained why it would object to a requirement for a written acknowledgment that such funds are being collected and held in a fiduciary capacity on behalf of the participating group, similar to the capacity under which a licensed TPA holds any funds it collects on behalf of an individual or group self-insurer or an insurance carrier pursuant to 24-A M.R.S. § 1909. If DR's objection is to the language prohibiting the administrator that collects premiums on behalf of the group from spending the group's money on any purposes other than those "specified by this rule and the fronting company's plan of operation," DR has not identified any other purpose that it believes should be added to those permitted uses.

Section 7(6), security when a participating group terminates operation

Comment: This subsection, as proposed, would have required a participating group that terminates operation to secure its obligations under fronting arrangements to the 90% confidence level. DR objected, asserting that "It is unreasonable to require a 90% confidence level.... The Bureau is aware of how unnecessary such a high funding requirement is, which is why the standards have been modified over the years to require that the funding level be both adequate and fiscally sound." DR also provided extensive cross-references to other provisions in the rule designed to that the fronting company is adequately funded and claimants are adequately protected. DR urged instead that "An obligation relating to coverage for out of state employees should meet the confidence level requirement already in place for any group or groups."

Bureau Response: We agree that this rule is not the place to specify the confidence level, because we agree that the applicable confidence level should be the same confidence level to which the group's other obligations are secured. When the group's termination security is drawn to pay claims, it is drawn to pay them in full when due, not to pay them to a particular confidence level, and the security must be available to satisfy all valid claims.

This subsection has been revised accordingly. However, we disagree with DR's implication that it is unreasonable to require a higher confidence level for terminated groups than we require for the ongoing operations of financially strong groups, and we note that many of the protections elsewhere in the rule that were cited in DR's comment depend on the ongoing existence of the participating group. We have also made one additional revision, in response to DR's general comments that we should not interfere with the regulatory authority of the coverage state. In most case, this will not be relevant because it is the fronting company that operates in the coverage state, not the participating group, but there might be cases where the conditions of the fronting company's approval in a particular state require the participating group to consent to the coverage state's jurisdiction and to post some sort of security specifically tied to the obligations assumed by the group with respect to fronting arrangements in that state. Therefore, as provisionally adopted, this subsection now reads as follows:

6. If a participating group terminates operation, the termination plan or termination order shall specify the process for termination of fronting arrangements, consistent with the requirements of Section 12 and Subsection 5 of this section, and shall require the group's obligations under fronting arrangements, including any obligations arising out of in-force policies, to be secured in the same manner and to ~~at least~~ the ~~90%~~ same confidence level as the group's direct obligations as a Maine self-insurer. Any security instrument, including an assumption reinsurance agreement issued in accordance with 39-A M.R.S. § 403(5)(D), shall include appropriate provision for payment of the group's obligations arising out of fronting arrangements. If the group is subject to a coverage state's requirements to provide and maintain additional security, the termination plan shall address those requirements.

Section 8(1)(A), guaranty from sponsoring reinsurance account

Comment: This paragraph requires the sponsoring reinsurance account to guarantee the obligations of its member groups to remedy any shortfall in funding if the assets of the participating group are inadequate to cover the fronting company's obligations under any fronting arrangement. DR objects to this requirement based on its assertions that the fronting company "is a distinct entity that stands on its own as an applicant" and that the rule should not impose any requirements that are not already specified in the statute. "In addition," DR adds, "this provision is unnecessary given the obligations placed on groups under 39-A §403 §4-B (B)(1) and §403 generally."

Bureau Response: 39-A M.R.S. § 403(4-B)(B)(1)(a) requires that "the assets of the members of the group self-insurance reinsurance account must be available to satisfy the obligations of a fronting company if the assets of the group self-insurer are inadequate to cover the obligations of the fronting company." This requires all member groups, collectively, to unconditionally guarantee the fronting company's obligations against the risk that the participating group that is primarily responsible is unable to perform, but it does not specify the mechanism by which this is done. The Legislature has created a mechanism by which the member groups can collectively assume joint and several

liability, and that is the reinsurance account itself. DR has not explained why this is not the best mechanism for that purpose, nor proposed any other mechanism.

Section 10(2)(B), termination for adverse impact on accreditation

Comment: This paragraph provides that a fronting company's approval may be terminated if "The operations of the fronting company are adversely impacting the Bureau's compliance with financial accreditation standards of the National Association of Insurance Commissioners." DR objects that this provision, and the related requirement at Section 5(4)(A) to consider the impact on accreditation when reviewing a fronting company application, "should be deleted. There is no law in Maine's history where accreditation is set forth as a statutory standard for an insurance regulator. The standard cannot be applied with any objectivity. It actually deters innovation and should not be used as a cudgel to bludgeon an innovative idea."

Bureau Response: The language of this paragraph is taken *verbatim* from the controlling statute, 39-A M.R.S. § 403(4-B)(B)(2)(e). See also our response to DR's comments on section 5(4)(A).

Section 11(3) and Section 11(4) (Proposed Section 11(3)), responsibility for claims against insolvent fronting companies

Comment: Section 11(3) provides that if a fronting company's assets have been fully distributed in dissolution or liquidation, or otherwise exhausted, any remaining obligations become the direct obligations of its participating groups. As proposed, the second part of this subsection provided that MSIGA and MIGA have no obligation to protect claimants, that no person may represent that such protection is available, and that whether guaranty association protection is available in a coverage state shall be determined solely under the laws of that state. DR's only objection to Proposed Section 11(3) is its assertion that "To the extent that the obligations of a fronting company are ceded to a member group or groups, and any such group or groups and the employees of any such group or groups are beneficiaries under the Maine Self-Insurance Guaranty Association, and such group or groups can be obligors under the Association, the Association should be obligated to protect Maine employer employees, wherever they may be working. In addition, Title 24-A, c.57 involving the Maine Guaranty Association (§3444(3)) works in the same fashion."

Bureau Response: The intent of Proposed Section 11(3) was to address claims against an insolvent or dissolved fronting company, not claims against an insolvent group self-insurer. We made some clarifying revisions and have divided this subsection into two separate subsections. As provisionally adopted, Section 11(3) deals with the safety net provided under Maine law if a fronting company should become insolvent, and Section 11(4) deals with guaranty funds. Because a fronting company is neither a group self-insurer nor a Maine-licensed insurance company, it cannot be a member of either MSIGA

or MIGA, so any guaranty fund protection that might be available would be the responsibility of the respective coverage states. As provisionally adopted, Section 11(3) and Section 11(4) read as follows:

> 3. If a fronting company's assets have been fully distributed in dissolution or liquidation, or otherwise exhausted, any remaining obligations shall become the direct obligations of its participating groups or their successors or guarantors.
>
> 4. The Maine Self-Insurance Guarantee Association and Maine Insurance Guaranty Association shall have no obligation to protect ~~claimants~~ persons with claims against an insolvent fronting company, and no person may represent that such protection is available. Whether ~~guaranty association~~ protection is available from a guaranty association in a coverage state shall be determined solely under the laws of that state.