

**New York State Workers' Compensation Board  
Frequently Asked Questions Related to Deficit Assessment Billing  
Package for  
Mercantile Self-Insurance Trust ("Mercantile" or "Trust")**

**I. ALLOCATION METHODOLOGY FOR PRO RATA BILLING**

**How was my pro rata share of the deficit determined?**

Your share of any existing deficit was determined consistent with the language in the documents which govern Mercantile's operations (trust document, bylaws, etc.). The deficit was allocated to members as a proportional share of their contribution (i.e., premium) to total contributions for a specific year. However, please note that for each year (or part of a year) in which you were a member of Mercantile, you are jointly and severally liable for the entire amount of the deficit for that year for which you were a member of Mercantile (see Section II below on joint and several liability) and that this joint and several liability could result in additional billings.

**What if a member has questions as to the years it was in Mercantile or the amounts credited for payments made by the member on the invoice for the pro rata deficit assessment?**

The member needs to provide documentation on these issues to the WCB's designated third party administrator **NCA Comp, Inc., Rand Building, Suite 700, 14 Lafayette Square, Buffalo, New York 14203**. The member may also scan and e-mail the documentation to [William.Osta@wcb.ny.gov](mailto:William.Osta@wcb.ny.gov), who will forward the documentation to **NCAComp, Inc.** If, based on the documentation provided, **NCAComp, Inc.**, determines, in consultation with the WCB, that the invoice was in error in this regard, a revised invoice will be sent. However, the original forty five (45) day deadline to enter into a Deficit Assessment Contractual Agreement (DACA) will remain in effect. **Also, please note that for each year (or part of a year) in which you were a member of Mercantile, you are jointly and severally liable for the entire amount of the deficit for that year for which you were a member of the group** (see Section II below on joint and several liability) **and that this joint and several liability could result in additional billings.**

**I was a member in one or more of the fiscal year(s) ending December 31, 1996, 1998 or 1999 which are listed as a surplus. Can these funds be used to offset deficits from other years?**

Each year that Mercantile operated is independent of the other years that Mercantile operated for the purposes of calculating the Trust's deficit. Thus, while the year ending December 31, 1996, 1998 or 1999, may appear to have a surplus at this time, other years remain as deficits and funds are needed for these years now. Accordingly, a potential surplus year cannot be used by a particular member to offset their deficit years.

**What if a member does not agree with the contribution they paid for any given period, or believes that other members were not paying the appropriate contributions and, therefore, the deficit assessment is based on an incorrect contribution percentage?**

Because members are jointly and severally liable for the assessment, the WCB could elect to pursue only certain members for the entire amount of the deficit under the principles of joint and several liability. Instead, the WCB has made a good faith effort to reasonably calculate each member's pro rata share of the deficit using generally accepted allocation methodologies prevailing in the industry.

**I was never a member of Mercantile because the WCB rejected my application for membership. Why am I being considered such for purposes of the assessment?**

The rules and regulations that govern group trusts like Mercantile require that coverage becomes effective in the group upon execution of a new member's participation agreement. This is because employers are required to obtain workers' compensation coverage for their employees and there are very significant civil and criminal penalties for the failure to do so. Accordingly, in the event that an application for participation was subsequently rejected, the WCB provided coverage in the group for at least thirty days to provide adequate time for the employer to obtain alternate coverage. When an application is rejected the WCB notifies both the group administrator and the member. If your application was rejected, you were provided at least thirty days coverage in Mercantile and are therefore responsible for your portion of the assessment applicable to that year.

## **II. JOINT AND SEVERAL LIABILITY**

**What does joint and several mean?**

Joint and several liability means that each member is liable for the entire amount of each year's deficit for which they participated in Mercantile. The liability may be apportioned either among the members or assessed against only one member. This means that each member is potentially liable for the entire amount of the deficit owed for the period for which it was a member of the group. ***It must also be remembered that this joint and several liability could result in additional billings.***

**What companies am I jointly and severally liable with?**

As a member of a group trust, an employer is jointly and severally liable for all obligations incurred during its period of membership. You are jointly and severally liable with the other employers who participated in Mercantile at the same time.

### **If my company never had a claim, am I still jointly and severally liable?**

Yes. Joint and several liability applies even if you never had a claim.

### **III. POTENTIAL ACTIONS AGAINST OTHER PARTIES AND RECOVERIES**

#### **Is the WCB pursuing other parties such as the Trustees or group administrator for their actions or inactions?**

The WCB is in the process of reviewing the Forensic Accounting Service Engagement for Mercantile. In the event that it is determined that one or more former key agents of Mercantile were at least in part responsible for Mercantile deficit, the WCB will commence an action or actions against those responsible parties to recoup funds. In the event that the WCB commences such an action and monies are recouped from third parties, these funds will be used to reduce the deficit amounts owed by the members of Mercantile. However, and notwithstanding any potential future third party recoveries, the Mercantile members remain responsible to make payments on the deficit assessments so as to ensure that Mercantile injured workers continue to receive their benefits in a timely fashion.

Each member should also review all available information and make a determination as to what, if any, action it should take in this regard.

#### **Is the WCB making a claim under any E&O or D&O policies that the group administrator or other such entities may have had?**

As indicated above, the WCB continues to gather and evaluate information and will pursue any other such claims where applicable and appropriate. Each member should also review any such information and make a determination as to what, if any, action it should take in this regard.

#### **Mercantile had an excess policy on a per occurrence basis. Does that mean that my exposure under joint and several is limited?**

Every group trust is required to maintain excess coverage on a per occurrence basis. This means that an insurance carrier could be responsible for any amounts on a particular claim which exceed the retention, or deductible limit. However, most claims fall well below the retention limit and this type of coverage only protects Mercantile from catastrophic claims. Moreover, the amounts contained in the forensic accounting, and the resultant invoices, already reflect appropriate reductions in liabilities as a result of excess insurance where such coverage was triggered.

#### **What happens if collections exceed the amount assessed?**

If more money is collected than is needed to meet all obligations of Mercantile such funds will be returned to members proportionally, if they are not in default status. However, surpluses attributable to any particular year will not be credited/refunded to

the members participating in Mercantile until all of the obligations of Mercantile for that particular year have been extinguished.

#### **IV. INFORMATION AVAILABLE**

##### **Under what section of the Workers' Compensation Law are group self insured trusts permitted?**

Group self-insured trusts are permitted under WCL Section 50 (3-a). Rules and regulations governing group trusts can be found in NYCRR Title 12 Part 317.

##### **As a member, what information is available to me regarding Mercantile?**

As a former member of an inactive trust, an employer is entitled to any of the records which pertain to their period of membership including financial and actuarial reports and membership information. However, any information provided may be redacted to protect the privacy of individual claimant's and/or other employer members. The WCB has established a website with relevant information for Mercantile and that link is included in the cover letter received with the invoice.

#### **V. DISSOLUTION OR BANKRUPTCY**

##### **What if my company is dissolved or bankrupt?**

The WCB requires that additional information and documentation be provided in order for the WCB to review and consider the impact, if any, of the claimed dissolution or bankruptcy.

As to dissolution, please provide the following documentation:

- 1) The "Consent" issued by the State Tax Commission, required by the New York State Business Corporation Law (BCL) as a condition to the corporation's dissolution;
- 2) The Certificate of Dissolution issued by the New York State Department of State;
- 3) The corporate resolutions and records, in whatever media, memorializing the dissolution of the corporation, the distribution of its assets, and whether any assets remain in the corporation;
- 4) All financial statements produced during the two years immediately preceding the corporation's dissolution, and any such statements produced after its dissolution;
- 5) The cash disbursements records for the two years immediately preceding the corporation's dissolution, and any such disbursements since its dissolution;

- 6) The corporation's complete, final federal and state tax returns, including all schedules, statements, and attachments filed therewith, and any amendments thereto;
- 7) A statement indicating whether the corporation gave notice to its creditors, pursuant to BCL § 1007, and, if so, documentation of such notice and the creditors to which such notice was given;
- 8) A statement indicating whether any proceeding was instituted pursuant to BCL § 1008, and, if so, the documentation identifying the parties to the proceeding, the court and county in which the proceeding was commenced, and the index number of the proceeding;
- 9) A statement indicating whether the corporation was dissolved pursuant to Article 11 of the BCL, and, if so, the documentation identifying the parties to the case, the court and county in which the case was commenced, and the index number of the case; and
- 10) Documentation of any litigation, judicial, administrative, arbitrate or otherwise, commenced by, or against, the corporation after its dissolution. Such documentation should include the identities of the parties to such litigation, the court (tribunal), county, and state in which the case was commenced, and the index or other identifying number of the case.

As to bankruptcies, please provide the following information:

- 1) The Notice of the filing of a bankruptcy case;
- 2) Any Notice of the conversion of the bankruptcy case from one chapter of the bankruptcy code to another;
- 3) The original case number under which the bankruptcy case was filed, and; if applicable, and other case numbers of associated bankruptcy cases;
- 4) The Notice of the granting of a bankruptcy discharge; and
- 5) The Notice of the dismissal of the bankruptcy case.

In either event, the above information should be provided to the WCB's Litigation Division located at 328 State St, Schenectady, NY 12305 and must be received by the WCB no later than the forty-five (45) day deadline set forth in the Deficit Assessment Billing Package you received from the WCB.

### **What is the impact if a member is dissolved or bankrupt?**

As previously stated, the members of Mercantile are jointly and severally liable for any deficits attributable to the period in which they participated in Mercantile. Therefore, an additional deficit assessment of the other members could occur.

## **VI. RESPONSE TO WCB DEFICIT ASSESSMENT BILLING**

**What will happen if I do not sign the Deficit Assessment Contractual Agreement (DACA), but do send a check for my first payment in an appropriate amount and continue to make the appropriate monthly payments?**

The WCB appreciates a member's attempt at showing good faith and cooperation by making the proper payment(s). Despite this, the DACA is the only legal mechanism which preserves the WCB's rights, and those of the other members, who could be potentially impacted by your failure to pay in the future. Therefore, absent a signed Agreement, the WCB will pursue a collections action against the member. However, if the proper payment is received on or before forty-five (45) days from the date of the invoice enclosed in the Assessment Billing Package, even though the Agreement is not signed, the WCB will consider, in its discretion, an extension of time to answer any legal process issued to the member to collect the Trust deficit as well as possibly foregoing the collection fee and/or any interest for late payment (not including the interest associated with your chosen payment plan) provided for in State Finance Law Sections 18.4 and 18.5.

### **What happens if I do not pay my obligation to the trust?**

As stated in the correspondence from the WCB, if a member does not pay the obligations incurred in connection with its membership in Mercantile, the WCB will consider the member in default. This will subject the member to enforcement and collection proceedings as authorized by law, including the initiation of a collections action against the member with the potential for an additional 22% collection cost plus interest being added to the pro rata assessment against the member as authorized by State Finance Law Section 18 and/or the imposition of a judgment, pursuant to WCL §26, in the amount of that member's unpaid claims expenses.

### **Why am I being given only forty-five (45) days to respond to the Deficit Assessment Billing Package from the WCB?**

This is necessary to ensure that the State it is acting in a manner fully compliant with the legal requirements of the WCL and to protect all of the rights and interests of the members of Mercantile, and the injured workers of the employer members of Mercantile. In this regard it is noted that the WCB has been making the claims payments and paying medical bills of injured workers of the employer members of Mercantile from funds borrowed pursuant to Section 50(5)(g) of the WCL