STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAYROLL MANAGEMENT, INC.,

Petitioner,

vs. Case No. 16-3769

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Respondent.
_______________________________/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 9, 2016, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge, via video teleconference from locations in Jacksonville and Tallahassee, Florida.

APPEARANCES

For Petitioner: Nate Wesley Strickland, Esquire
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For Respondent: David Davis Hershel, Esquire
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STATEMENT OF THE ISSUE

At issue in this proceeding is whether Payroll Management, Inc. ("PMI"), a former self-insurer, should be required to increase its qualifying security deposit with the Florida Self-Insurers Guaranty Association, Inc. ("FSIGA"), from $5,144,108 to $7,434,705, as directed by the Department of Financial Services, Division of Workers' Compensation (the "Department").

PRELIMINARY STATEMENT

On May 11, 2016, FSIGA submitted a recommendation to the Department recommending that the Department require PMI, a former workers' compensation self-insurer in Florida, to increase its qualifying security deposit held by FSIGA from $5,144,108 to $7,434,705, based on FSIGA's determination that PMI lacked the financial strength to ensure the timely payment of all claims it incurred while a self-insurer in Florida. By letter dated May 25, 2016, the Department notified PMI of FSIGA's recommendation, that the Department had accepted FSGIA's recommendation, and directing PMI to increase its security deposit to $7,434,705.

On June 21, 2016, PMI timely filed with the Department a "Request for Hearing Involving Disputed Issues of Fact," contesting the Department's preliminary decision and requesting a formal evidentiary hearing.

On July 1, 2016, the Department forwarded the Request for Hearing to the Division of Administrative Hearings ("DOAH") for the assignment of an administrative law judge and the conduct of a formal hearing. The final hearing was scheduled for September 13, 2016. One continuance was granted based upon PMI's unopposed motion. The final hearing was rescheduled for November 9, 2016, on which date it was convened and completed.

At the hearing, Petitioner presented the testimony of Donna C. Mickle-Bee, the President and CEO of PMI; Brian D. Gee, the Executive Director of FSIGA; and Steven Glicksman, the Principal of Glicksman Consulting, LLC, and PMI's actuary. Petitioner's Exhibit 1 was admitted into evidence.

The Department presented the testimony of Mr. Gee and of Greg Jenkins, the Department's Bureau Chief of Financial Accountability. The Department's Exhibits 1 through 6 were admitted into evidence.

Joint Exhibit 1, the March 25, 2016, actuarial study of PMI prepared by Mr. Glicksman, was admitted into evidence.

The one-volume Transcript of the final hearing was filed at DOAH on November 28, 2016. One extension of the time for filing proposed recommended orders was granted. In accordance with the modified schedule, the parties timely filed their Proposed Recommended Orders on December 16, 2016.

Unless otherwise stated, all statutory references are to the 2016 edition of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following Findings of Fact are made:

1. The Department is the state agency responsible for administering the Workers' Compensation Law, chapter 440, Florida Statutes.

2. The Department's responsibilities include administration of the self-insurance program in conjunction with FSIGA, pursuant to sections 440.38, 440.385, and 440.386, Florida Statutes.

3. FSIGA is a private, not-for-profit corporation created by section 440.385. The chief purpose of FSIGA is to guarantee payment of covered workers' compensation claims to employees of its insolvent member self-insurers. All self-insurers, other than public utilities and government entities, are required to be members of FSIGA as a condition of their authority to self-insure. § 440.385(1)(a), Fla. Stat.

4. Sections 440.10(1) and 440.38(1) establish the general requirement that employers must obtain and maintain workers' compensation insurance in Florida. The exception to this general requirement is set forth in section 440.38(1)(b), which

allows an employer to self-insure after furnishing satisfactory proof to FSIGA that such employer "has the financial strength necessary to ensure timely payment of all current and future claims individually and on behalf of its subsidiary and affiliated companies with employees in this state and receiving an authorization from the department to pay such compensation directly." § 440.38(1)(b), Fla. Stat.

5. FSIGA pays the covered claims of current and former insolvent self-insurer members to the extent an insolvent self-insurer's security deposit is insufficient to cover the claims. An insolvency fund is established and managed by FSIGA for the purpose of meeting the obligations of insolvent members after the exhaustion of any security deposit. Pursuant to section 440.385(3)(a), FSIGA assesses its members to maintain the insolvency fund.

6. In the event FSIGA determines that a current or former member lacks financial strength necessary to ensure timely payment of current and estimated future workers' compensation claims, FSIGA may recommend that the Department require an increase to such member's "security deposit in an amount determined by the association to be necessary to ensure payment of compensation claims." § 440.385(3)(b)7.c., Fla. Stat.

7. The Department is required to accept FSIGA's recommendation unless it finds by clear and convincing evidence

that the recommendation is erroneous. §§ 440.38(1)(b) and 440.385(6)(a), Fla. Stat.

8. PMI is a privately owned professional employer organization headquartered in Fort Walton Beach. It has conducted business throughout Florida and the southeastern United States for over 30 years. PMI was authorized as a self-insurer for workers' compensation in Florida on September 1, 2001. It was required to post an initial security deposit of $1,000,000 with FSIGA.

9. Between 2001 and 2015, FSIGA made annual recommendations to the Department, pursuant to sections 440.38(1)(b) and 440.385(3)(b)7., as to whether PMI should be required to increase its qualifying security deposit based on a review of the company's financial strength as reflected in its financial statements. By 2015, PMI's security deposit had grown to $5,144,108. Through 2015, PMI had posted and maintained its qualifying security deposit every year it participated in the self-insurance program.

10. In late March 2016, PMI submitted an actuarial report dated March 25, 2016, to FSIGA. The actuarial report was prepared by Steven Glicksman and determined that PMI's estimated outstanding losses, i.e., the cost of unpaid claims, were $7,960,339 as of December 31, 2015, and that the actuarial present value of PMI's estimated outstanding losses as of

December 31, 2015, using a four-percent (4%) discount rate as prescribed by Florida Administrative Code Rule 69L-5.218(2), was $7,434,705.

11. The March 25, 2016, report included the following notes:

> Comparison to Previous Study
>
> The estimated outstanding losses (actuarial central estimate) are $7,960,339 as of December 31, 2015. This compares to $5,514,248 as of December 31, 2015 in the previous study (dated April 30, 2015).
>
> The variance is a material adverse deviation. The increases in 2015 are due primarily to actuarial payroll in 2015 being $173,681,101 compared to the projected payroll of $110,000,000. Greater payroll corresponds to an increased exposure to loss.
>
> We also observed that 2014 is emerging higher than previous projections.
>
> Potential for Material Adverse Deviation
>
> The estimated outstanding losses are the actuarial central estimate. It is based on the probable outcomes, but not all possible outcomes. The risk of material adverse deviation is a judgment as to actual losses materially exceeding the actuarial central estimate.
>
> The Actuarial Standard of Practice (ASOP 36) requires commentary when the actuary "reasonably believes that there are significant risks and uncertainties that could result in material adverse deviation." ASOP 36 does not specify a materiality standard.

- As with all insurance programs, there is the possibility that losses will emerge worse than expected.

- PMI is a relatively small sized program.

- The historical loss experience had had an occasional large claim. PMI purchases reinsurance to mitigate the impact of catastrophic claims. It currently has a $500,000 self-insured retention. However, there is the potential for multiple large claims within the retention.

- There have [been several] operational changes that may have impacted loss development. There is convincing evidence that PMI has accelerated its paying losses and is reserving more adequately [than] it has in the recent past.

- There has been material change in the mix of class codes.

- There is a roll-forward extrapolation to December 31, 2016.

- We have supplemented internal data with insurance industry statistics and actuarial judgment.

We have not set a materiality standard. However, based on the above factors, we believe that the estimated outstanding loss amount is subject to a significant level of risk of adverse deviation as of December 31, 2015 and December 31, 2016.

This disclosure is based on ASOP 36 and is not intended to be exclusive to this situation. Differences in the disclosure from previous studies are not intended to be a material change in our opinion, unless specifically stated otherwise. It is not a qualification of the study.

12. Effective May 1, 2016, PMI voluntarily terminated its authorization to self-insure its workers' compensation claims in Florida.

13. On May 11, 2016, FSIGA recommended that the Department require PMI to increase its qualifying security deposit by the amount of $2,290,597.[1/] That recommendation was made pursuant to sections 440.38(l)(b) and 440.385(3)(b)7. and rules 69L-5.209(l)(b) and 69L-5.218(2). The recommendation was based on FSIGA's review of PMI's financial statements and FSIGA's determination of an equivalent credit rating of Caa3 for PMI, a rating that is less than investment grade.[2/] FSIGA determined that PMI did not have the financial strength necessary to ensure timely payment of claims incurred as a self-insurer. The Department accepted FSIGA's recommendation, and by letter dated May 25, 2016, required PMI to increase its qualifying security deposit by the amount of $2,290,597, from $5,144,108 to $7,434,705. As of the date of the hearing, PMI had not posted the additional security with FSIGA.

14. Brian Gee, FSIGA's Executive Director, testified that he conducted an analysis of PMI's financial strength by examining its audited financial statements for the year ending December 31, 2013, and its draft financial statements for the year ending December 31, 2014.[3/] He derived an equivalent credit rating by applying a public domain Moody's Investors Service

methodology. He checked his result against a proprietary Moody's product called RISCCALC PLUS, a model based on a large database of financial statements. The RISCCALC PLUS model uses default frequencies to derive a credit rating. Mr. Gee's analysis led him to conclude that PMI does not have the financial strength necessary to ensure the timely payment of its self-insured claims.

15. Mr. Gee testified that his review of PMI's financial information led him to conclude it lacks the financial strength to ensure timely payment of claims. He cited several factors supporting his conclusion: PMI has shown net losses over the past three years; the company is highly leveraged, with low owners' equity relative to total liabilities; uncertainty regarding the collectability of a $4 million receivable from British Petroleum ("BP")[4/]; and a large amount of back taxes owed to the Internal Revenue Service.[5/]

16. Mr. Gee also took note of the facts that PMI's 2014 financial statement was labeled "draft" and was not a signed auditor's opinion, and that PMI had supplied no financial statement at all for 2015. He stated that FSIGA had been requesting current financial information from PMI but was not receiving it. Mr. Gee concluded there was enough uncertainty in PMI's financial situation that he could conclude the company lacked the financial strength to ensure the payment of current

and future claims without regard to the calculation of an equivalent credit rating required by rule 69L-5.218(4).
Mr. Gee's conclusion is reasonable in light of the evidence and is hereby accepted.

17. Rule 69L-5.209 requires current and former self-insurers, including PMI, to submit financial statements, audited in accordance with Generally Accepted Auditing Standards, to FSIGA no later than 120 days after the end of their fiscal year. PMI's fiscal year ends on December 31. As of the hearing date, PMI had submitted only draft unsigned financial statements for fiscal year 2014,[6/] and no financial statements at all for fiscal year 2015.

18. On May 11, 2016, the Department received FSIGA's letter recommending the Department require PMI to increase its qualifying security deposit to $7,434,705. The recommendation was reviewed by staff of the Bureau of Financial Accountability (the "Bureau") in the Department's Division of Workers' Compensation.

19. Bureau Chief Greg Jenkins testified that the review did not involve recreating FSIGA's work in developing an equivalent credit rating for PMI. FSIGA collects and reviews financial statements and loss reserve information from self-insurers pursuant to contract with the Department and is considered the Department's financial expert as to these tasks.

Mr. Jenkins stated that Bureau staff did review other information for accuracy, including the numerical values set forth in FSIGA's recommendation letter.

20. Based on his staff's review, Mr. Jenkins approved the FSIGA recommendation. The Division of Workers' Compensation, concluding that the FSIGA recommendation was not erroneous, recommended to Chief Financial Officer ("CFO") Jeff Atwater that the Department accept FSIGA's recommendation and require PMI to increase its qualifying security deposit by $2,290,597, from $5,144,108 to $7,434,705. By letter dated May 25, 2016, signed by CFO Atwater, the Department required PMI to increase its security deposit by the stated amount.

21. On or about October 19, 2016, PMI submitted an updated actuarial report dated October 18, 2016, to FSIGA. The updated actuarial report was prepared by Mr. Glicksman and determined that PMI's estimated outstanding losses were $7,265,767 as of August 31, 2016, and that the actuarial present value of PMI's estimated outstanding losses as of August 31, 2016, using a four percent (4%) discount rate as prescribed by rule 69L-5.218(2), was $6,775,263.

22. Mr. Glicksman also included a projection of losses through December 31, 2016, which he explained as follows:

> The estimated outstanding losses (actuarial central estimate) are $5,758,346 as of December 31, 2016. The present value of the

> estimated outstanding losses (actuarial central estimate) is $5,369,488 based on a 4.0% interest rate as of December 31, 2016. These amounts assume old payment patterns.
>
> However, the amounts for December 31, 2016 are dependent on PMI's actual payments from September 1, 2016 to December 31, 2016. Since greater payments results in lower estimated outstanding losses, it is possible that PMI will have estimated outstanding losses of less than $5,758,346 (present value $5,369,488) on December 31, 2016.
>
> In fact, we have observed that PMI has accelerated payments. From January 1, 2016 to August 31, 2016, paid losses equaled $4,963,579 ($620,488 per month). We have modeled a continuation of accelerated payments. Assuming projected losses paid of $1,959,647 ($477,395 per month) from September 1, 2016 to December 31, 2016, estimated outstanding losses are $5,356,187 and the present value of the estimated outstanding losses are $4,995,098 on December 31, 2016. We believe these amounts are reasonable. [Citations to internal exhibits omitted.]

23. Mr. Glicksman testified that material differences emerged during the period between his completion of the March 25, 2016, report and the October 18, 2016, report. Mr. Glicksman explained that more recent information, including a date certain for PMI's termination of its self-insurer authorization, improved loss information, increased reserves, and accelerated claims payments, led him to believe that the estimated losses were less than he had originally projected.

24. Mr. Glicksman testified that, upon noticing that PMI's claims payments had accelerated much faster than he expected, he contacted Ms. Mickle-Bee regarding the claims data. Ms. Mickle-Bee confirmed to Mr. Glicksman that PMI was closing claims as rapidly as possible.

25. At the hearing, Ms. Mickle-Bee testified that PMI has always paid claims at an "aggressive" rate as an overall costs savings measure. She stated that the company's experience has been that providing quick medical treatment and paying the bills greatly reduces the chances of litigation. Mr. Glicksman supported this view, testifying that "there's nothing better than a closed claim to reduce costs."

26. Mr. Glicksman concluded by stating that "there could be no good outcome" to requiring PMI to increase its security deposit to $7,434,705. He testified, "They're already holding more than enough money to pay off their claims . . . with almost certainty. And by pushing PMI into . . . a financial stress, it can't improve their situation, it can only hurt it. I don't know why they would do it."

27. Mr. Gee testified that he had as yet reached no conclusions about the October 18, 2016, actuarial report. He testified that a claims reviewer had been assigned to look at the case files, which are the main input into the actuarial process. Mr. Gee also stated that he had made "some preliminary

findings about some self-insured retention numbers that appear to be incorrect," but that he was awaiting results from the claims reviewer in order to draw a conclusion about the report.

28. Mr. Jenkins testified that he has received a copy of PMI's October 18, 2016, actuarial report. Mr. Jenkins stated that he had glanced at the report but was awaiting a recommendation from FSIGA before undertaking a thorough review of the document.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

30. Chapter 440, Florida Statutes, is the Workers' Compensation Law, the purpose of which has been described as "to provide for employers a liability that is limited and determinative, and to employees a remedy that is both expeditious and independent of proof of fault." Fla. Erection Serv., Inc. and Risk Mgmt. Serv., Inc. v. McDonald, 395 So. 2d 203, 209 (Fla. 1st DCA 1981). Section 440.015 sets forth the legislative intent as follows, in relevant part:

> It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer . . . . It

> is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The department, [Agency for Health Care Administration], the Office of Insurance Regulation, the Department of Education, and the Division of Administrative Hearings shall administer the Workers' Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments.

31. This proceeding focuses on the self-insurance portion of the Workers' Compensation Law, the basic statutory framework for which is established in sections 440.38, 440.385, and 440.386. These statutory provisions are implemented by Florida Administrative Code Chapter 69L-5.

32. The Department administers the self-insurance program for liabilities arising under the Workers' Compensation Law, and has jurisdiction over PMI as a former self-insurer[7/] pursuant to sections 440.38 and 440.385.

33. Section 440.38(1)(b) provides as follows, in relevant part:

> (1) Every employer shall secure the payment of compensation under this chapter:
>
> * * *
>
> (b) By furnishing satisfactory proof to the Florida Self-Insurers Guaranty Association, Incorporated, created in s. 440.385, that it has the financial strength necessary to ensure timely payment of all current and

future claims individually and on behalf of its subsidiary and affiliated companies with employees in this state and receiving an authorization from the department to pay such compensation directly. The association shall review the financial strength of applicants for membership, current members, and former members and make recommendations to the department regarding their qualifications to self-insure in accordance with this section and ss. 440.385 and 440.386. The department shall act in accordance with the recommendations unless it finds by clear and convincing evidence that the recommendations are erroneous.

34. Section 440.385(1) provides as follows, in relevant part:

> (1) Creation of association. —
>
> (a) There is created a nonprofit corporation to be known as the "Florida Self-Insurers Guaranty Association, Incorporated," hereinafter referred to as "the association." Upon incorporation of the association, all individual self-insurers as defined in ss. 440.02(24)(a) and 440.38(1)(b), other than individual self-insurers which are public utilities or governmental entities, shall be members of the association as a condition of their authority to individually self-insure in this state . . . . The activities of the association shall be subject to review by the department. The department shall have oversight responsibility as set forth in this section . . . .
>
> * * *
>
> (b) A member may voluntarily withdraw from the association when the member voluntarily terminates the self-insurance privilege and pays all assessments due to the date of such termination. However, the withdrawing member shall continue to be bound by the provisions

> of this section relating to the period of his or her membership and any claims charged pursuant thereto . . . .

35. Section 440.385(3) provides as follows, in relevant part:

> (3) Powers and duties. —
>
> * * *
>
> (b) The association may:
>
> * * *
>
> 7. Collect and review financial information from employers and make recommendations to the department regarding the appropriate security deposit and reinsurance amounts necessary for an employer to demonstrate that it has the financial strength necessary to ensure the timely payment of all current and future claims. The association may audit and examine an employer to verify the financial strength of its current and former members. If the association determines that a current or former self-insured employer does not have the financial strength necessary to ensure the timely payment of all current and estimated future claims, the association may recommend to the department that the department:
>
> a. Revoke the employer's self-insurance privilege.
>
> b. Require the employer to provide a certified opinion of an independent actuary who is a member of the American Academy of Actuaries as to the actuarial present value of the employer's estimated current and future compensation payments, using a 4-percent discount rate.
>
> c. Require an increase in the employer's security deposit in an amount determined by the association to be necessary to ensure payment of compensation claims. The

> department shall act on such recommendations as provided in paragraph (6)(a) . . . .

36. Section 440.385(6)(a) provides as follows:

> (6) Powers and Duties of Department.--The department shall:
>
> (a) Review recommendations of the association concerning whether current or former self-insured employers or members of the association have the financial strength necessary to ensure the timely payment of all current and estimated future claims. If the association determines an employer does not have the financial strength necessary to ensure the timely payment of all current and future claims and recommends action pursuant to paragraph (3)(b), the department shall take such action as necessary to order the employer to comply with the recommendation, unless the department finds by clear and convincing evidence that the recommendation is erroneous.

37. Rule 69L-5.209(1)(b) provides as follows:

> Current Self-Insurers and Former Self-Insurers, other than Governmental Entities, shall submit their Financial Statements no later than 120 days after the end of their fiscal year. Failure to submit the required Financial Statements shall constitute good cause for revocation of the self-insurance authorization in addition to civil penalties specified in Rule 69L-5.217, F.A.C.
>
> (1) The Financial Statements shall meet the following requirements:
>
> * * *
>
> (b) The Financial Statements shall demonstrate that the self-insurer has the financial strength necessary to ensure the timely payment of all current and future claims . . . .

38. Rule 69L-5.218(3), (4) provides:

> (3) Former Self-Insurers, other than Governmental Entities, that do not have an Investment Grade Credit Rating shall provide a Security Deposit equal to the actuarially determined outstanding loss reserves discounted to present value at a four percent (4%) discount rate. In no case shall the amount of the Security Deposit be less than $100,000.
>
> (4) In the event that a Current Self-Insurer or Former Self-Insurer does not have a current published Credit Rating, the Association or the Department shall determine an equivalent rating by performing an analysis of the Financial Statements provided in accordance with Rule 69L-5.209, F.A.C., and the amount of the Security Deposit shall be determined using the equivalent rating as the Credit Rating. A Current Self-Insurer or Former Self-Insurer that disagrees with the equivalent rating may provide a current Credit Rating. If the Current Self-Insurer or Former Self-Insurer provides a current Credit Rating, the security deposit requirement will be determined using the current Credit Rating instead of the equivalent rating and any excess security deposit will be released.

39. PMI is a former self-insurer and does not have a current published Credit Rating. PMI did not dispute FSIGA's determination that PMI's equivalent rating was below investment grade. Therefore, PMI is required to provide a security deposit "equal to [its] actuarially determined outstanding loss reserves discounted to present value at a four percent (4%) discount rate."

40. The Department has preliminarily determined that PMI should be required to post a security deposit in the amount of $7,434,705, which is the amount of the actuarially determined loss reserves discounted to present value at a four-percent (4%) discount rate, on December 31, 2015, as established in PMI's March 25, 2016, actuarial report. This determination is based upon the recommendation of FSIGA, which the Department must act upon in the absence of "clear and convincing evidence that the recommendation is erroneous." § 440.385(6)(a), Fla. Stat.

41. PMI contends that its October 18, 2016, actuarial report constituted the best evidence of the company's financial condition at the time of the hearing. PMI asserts that it would be erroneous for the Department to increase its security deposit to more than $6,775,263, the amount of the actuarially determined loss reserves discounted to present value at a four-percent (4%) discount rate, as of August 31, 2016, as established in PMI's October 18, 2016, actuarial report.

42. The Department concedes that this proceeding is conducted de novo pursuant to section 120.57(1)(k), Florida Statutes, but argues that the statutory scheme for review of financial statements and actuarial reports for current and former self-insurers requires a recommendation from FSIGA to the Department for purposes of establishing the amount of a security deposit. This scheme contemplates review by both FSIGA and the

Department prior to agency action by the Department in response to FSIGA's recommendation. As of the date of the final hearing, FSIGA had made no recommendation to the Department regarding PMI's October 18, 2016, actuarial report.

43. The Department contends that, because financial strength determinations and security deposit requirements are a matter of special expertise for FSIGA and the Department, the doctrine of "primary jurisdiction" precludes consideration of the October 18, 2016, actuarial report in this proceeding.

44. In Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029, 1037-38 (Fla. 2001), the Court explained the cited doctrine as follows:

> The doctrine of primary jurisdiction dictates that when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency's special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the issue has been ruled upon by the agency.

45. It is understood that the issue in the instant proceeding is evidentiary, not jurisdictional. Primary jurisdiction would not operate to preclude DOAH from exercising its jurisdiction over a section 120.57(1) proceeding involving the Department. However, the undersigned is persuaded that the rationale underlying the doctrine of primary jurisdiction is analogous and applicable to the question of whether to rely on

the October 18, 2016, actuarial report as evidence in this proceeding, prior to the completion of FSIGA's review and recommendation. Prudentially waiting for FSIGA and the Department to fulfill their statutory review and approval functions will give this tribunal the benefit of the agency's experience and expertise in matters with which DOAH is not as familiar. See Flo-Sun, 783 So. 2d at 1037. When the FSIGA and Department reviews are complete, PMI will be provided its point of entry to bring the October 18, 2016, actuarial report before DOAH.

46. Some time has passed since the conclusion of the hearing in this matter. In the interim, FSIGA may have completed its review of PMI's October 18, 2016, actuarial report and made a recommendation to the Department as to a revision in the security deposit required of PMI. If this is the case, fundamental fairness would dictate that PMI be given the benefit of any reduction in the amount of the security deposit approved by the Department.

RECOMMENDATION

Based on the foregoing, it is, therefore,

RECOMMENDED that the Department of Financial Services enter a final order requiring Payroll Management, Inc., to increase its qualifying security deposit with the Florida Self-Insurers Guaranty Association, Inc., by $2,290,597, from $5,144,108 to

$7,434,705; or, in the alternative, that the Department of Financial Services withdraw its May 25, 2016, letter requiring Payroll Management, Inc., to increase its qualifying security deposit by the amount of $2,290,597, from $5,144,108 to $7,434,705 and issue a letter requiring PMI to increase its qualifying security deposit to the amount recommended by the Florida Self-Insurers Guaranty Association, Inc., after its review of the October 18, 2016, actuarial report submitted by Payroll Management, Inc.

DONE AND ENTERED this 5th day of April, 2017, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of April, 2017.

ENDNOTES

[1/] FSIGA originally recommended this increase to the Department by letter dated March 29, 2016. The Department accepted FSIGA's recommendation and issued a letter to PMI, dated April 14, 2016, directing the company to increase its qualifying security deposit by $2,290,597, from $5,144,108 to $7,434,705. PMI's

voluntary termination of its self-insurance authorization on May 1, 2016, caused FSIGA to rescind its original letter and revisit its recommendation. This action was not fully explained by the parties at the hearing, but the undersigned infers it was required because the Department's security deposit rule has separate, but functionally identical provisions for calculation of security deposits for current self-insurers that do not have an investment grade credit rating and for former self-insurers that do not have an investment grade credit rating. See Fla. Admin. Code. R. 69L-5.218(2), (3).

As indicated by the May 11, 2016, letter, FSIGA did not change its recommendation. The Department rescinded its April 14, 2016, letter in a letter dated May 25, 2016, that again directed PMI to increase its qualifying security deposit by $2,290,597, from $5,144,108 to $7,434,705.

[2/] If a FSIGA member has an investment grade credit rating published by one of the three nationally recognized rating agencies, then its security deposit with FSIGA is required to be only $100,000. Fla. Admin. Code R. 69L-5.218(1). "Investment grade credit rating" is a long-term issuer credit rating equal to or higher than "Baa3", "BBB-", or "BBB-" issued by Moody's Investors Service, Standard & Poor's, or Fitch Ratings, respectively. Fla. Admin. Code R. 69L-5.201(20). Because PMI lacked a credit rating published by one of the three agencies, FSIGA was required to determine an equivalent rating by performing an analysis of PMI's financial statements. Fla. Admin. Code R. 69L-5.218(4). At the hearing, PMI stipulated that it does not have an investment grade credit rating.

[3/] Mr. Gee was accepted without objection as an expert in accounting and financial analysis.

[4/] Mr. Gee testified that, despite his misgivings, he gave PMI full credit for the BP receivable in calculating the equivalent credit rating.

[5/] Donna C. Mickle-Bee, the President and CEO of PMI, testified that the company had been paying $50,000 per week to the IRS since 2012 and still owes "around" $3.6 million in back taxes.

[6/] Mr. Gee used information contained in the draft 2014 financial statements despite the fact that they were not signed by the auditor. As with his use of the BP receivable in his credit rating calculation, Mr. Gee was here giving PMI the benefit of every doubt.

[7/] Florida Administrative Code rule 69L-5.201(16) defines "former self-insurer" as "An employer authorized by the Department to fund its workers' compensation liabilities as prescribed in Sections 440.38(1)(b) or (6), F.S., whose authorization has been revoked or voluntarily terminated with remaining outstanding workers' compensation liabilities."

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.