

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY

Meeting Date:	March 12, 2013	<input type="checkbox"/> Consent	<input checked="" type="checkbox"/> Regular
		<input type="checkbox"/> Public Hearing	

Department

Submitted By: COUNTY ATTORNEY

Submitted For: RISK MANAGEMENT

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to: approve an Excess Policy Commutation Agreement ("Agreement") between Palm Beach County's excess worker's compensation insurance carrier, TIG Insurance Company ("TIG") and the Palm Beach County Board of County Commissioners ("County").

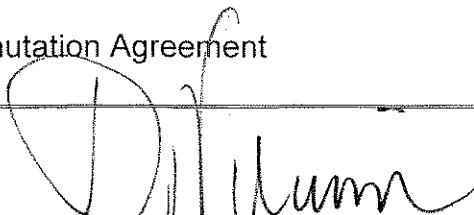
Summary: This Agreement arises from a project undertaken by staff to review old excess insurance policy contracts dating back to the 1970's through the early 1990's and to identify any outstanding opportunities to collect unfiled claim reimbursements that were not paid to the County for losses incurred under those policies during those years. This specific Agreement, between the County and TIG, if approved, relates to the latter-most portion of the project that identifies claim reimbursements from policies dating from January 1, 1991 through January 1, 1994, and will provide the County with \$1,700,000 in previously unreimbursed losses, including consideration for future loss expenditures. Countywide (PM)

Background and Justification: This Agreement relates to an insurance policy contract from January 1, 1991 through January 1, 1994 with TIG to provide excess worker's compensation insurance. The terms of the Agreement and the commutation dollar amount of \$1,700,000 are a culmination of substantial analysis and effort by Risk Management staff to identify and maximize the potential recovery from this policy for previously unreimbursed losses. Despite the age of the policy and the losses involved, staff has been able to reactivate this policy and generate activity by TIG. To date, TIG has resisted providing the County with certain reimbursements for losses under the policy. TIG has taken the position that some or all of the claimed losses are not payable under the terms of the subject insurance policy contract.

To avoid costly and protracted litigation, the outcome of which would be uncertain, both sides decided to enter into commutation discussions. This commutation allows the County to receive \$1,700,000 to invest for the payment of any future claims.
(continued on page 3)

Attachment:

- 1. Excess Policy Commutation Agreement

Recommended by:		<u>2/27/13</u>
	County Attorney	Date

Approved by: N/A
Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2013	2014	2015	2016	2017
Capital Expenditures	-0-	_____	_____	_____	_____
Operating Costs	-0-	_____	_____	_____	_____
External Revenues	(1,700,000)	_____	_____	_____	_____
Program Income (County)	-0-	_____	_____	_____	_____
In-Kind Match (County)	-0-	_____	_____	_____	_____
NET FISCAL IMPACT	_____	_____	_____	_____	_____
# ADDITIONAL FTE POSITIONS (Cumulative)	_____	_____	_____	_____	_____

Is Item Included in Current Budget? Yes _____ No _____

Budget Account No.: Fund _____ Department _____ Unit _____ Object _____
Reporting Category _____


B. Recommended Sources of Funds/Summary of Fiscal Impact:

Revenue will be used to fund future claims expense.

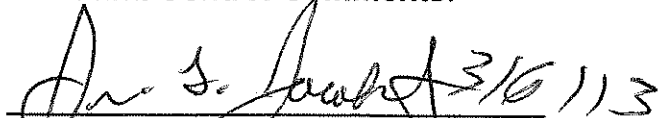
C. Departmental Fiscal Review: _____

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Development and Control Comments:

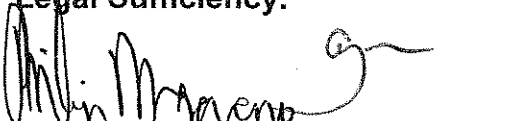


OFMB JB 2/26/13
2/26/13



Contract Development and Control
3-6-13 B. Wheeler

B. Legal Sufficiency:



Assistant County Attorney

C. Other Department Review:



Department Director

THIS SUMMARY IS NOT TO BE USED AS A BASIS FOR PAYMENT.

Background and Justification (continued)

In exchange for this payment, TIG's financial commitment under the subject insurance policy contract would end. On behalf of the County, staff has negotiated a commutation amount of \$1,700,000, for a full commutation of TIG's obligation to pay certain claims arising from the subject insurance policy contract. In arriving at this figure, staff had a clear understanding of the policy, including the value of the losses anticipated to arise in the future. Staff has also taken into account the contentious nature and possible denial of these claims that may result in the County being solely responsible for payment of these claims. Staff believes that the negotiated amount of \$1,700,000 will allow a present payment that is in the County's best interest considering reasonable future losses and expenses based on the historical payout pattern for such losses. The County Attorney's Office concurs in the approach taken by Risk Management staff in the negotiation of the agreement and in the dollar amount of the commutation.

EXCESS POLICY COMMUTATION AGREEMENT

This **Excess Policy Commutation Agreement** (hereinafter referred to as the "Agreement") is entered into and effective _____ by and between TIG Insurance Company and its parent, subsidiary, predecessor, and successor corporations, affiliates and/or assignees (hereinafter collectively referred to as "TIG") and Palm Beach County. "PBC" is used throughout this Agreement to refer, collectively and individually, to Palm Beach County and any and all entities, governmental bodies, counties, and/or agencies that were or are insured or otherwise entitled to coverage under the Policy (as defined below). TIG and PBC shall be referred to herein collectively as the "Parties," and individually as the "Party."

Recitals

WHEREAS, Transamerica Insurance Company issued or caused to be issued to PBC a policy of insurance styled "Specific Excess Workers [sic] Compensation and Employers [sic] Liability Policy," which policy was in full force and effect from January 1, 1991 through January 1, 1994, and more commonly identified as policy number W-146882 (hereinafter collectively referred to as the "Policy");

WHEREAS, TIG is the successor-in-interest to Transamerica Insurance Company with respect to the Policy;

WHEREAS, claims have been or may in the future be made against PBC for workers' compensation benefits as to which PBC is permissibly self-insured under the laws of the State of Florida;

WHEREAS, PBC has requested or may request from TIG reimbursement for covered "loss" and "claim expenses" as defined under the Policy arising from claims that have been or may in the future be made against PBC, whether previously disclosed to TIG or its representatives or not (hereinafter such requests for reimbursement are collectively referred to as the "Claims");

WHEREAS, a commutation involves an insurer fully and completely divesting itself of liability with respect to claims and potential claims under a particular policy in exchange for tendering to an insured a sum certain under the policy;

WHEREAS, the Parties have agreed to a commutation of any and all Claims as to which PBC has requested or may request reimbursement from TIG for covered "loss" and "claim expenses" as defined under the Policy, including without limitation any and all Claims presently unknown to PBC and/or TIG (hereinafter collectively referred to as the "Commutated Claims");

NOW THEREFORE, the Parties do hereby agree as follows:

1. All recitals set forth above are hereby incorporated into the terms of this Agreement.

2. Commutation of Claims. The Parties agree to the commutation of the Commuted Claims in exchange for TIG Insurance Company's payment of \$1,700,000 to be paid within 15 days of receipt by TIG of a fully executed Agreement. The date on which TIG's payment is due shall be referenced herein as the "Closing Date." PBC hereby releases, acquits, and forever discharges TIG from any and all payment obligations, adjustments, obligations, offsets, actions, causes of action, claims, suits, debts, sums of money, premiums, returned premiums, unearned premiums, liabilities, losses, salvage, accounts, reckonings, bills, commissions, covenants, contracts, agreements, promises, damages, judgments, expenses, and demands whatsoever, whether known or unknown, in law or equity, in contract or in tort, arising out of or related to the Commuted Claims, it being the intent of the Parties hereto that the commutation and settlement shall operate as a full and final settlement of TIG's past, present, and future obligations with respect to the Commuted Claims. Likewise, TIG releases PBC of any actions, causes of action, claims, suits, debts, sums of money, premiums, returned premiums, unearned premiums, liabilities, losses, salvage, accounts, reckonings, bills, commissions, covenants, contracts, agreements, promises, damages, judgments, expenses, and demands whatsoever, whether known or unknown, in law or equity, in contract or in tort, arising out of or related to the policy or the Commuted Claims. The Parties expressly agree that the scope of the Commuted Claims includes all Claims, whether past, present, or future and whether or not presently known to TIG and/or PBC.

3. PBC's Representations and Warranties. As a material inducement to TIG entering into this Agreement, PBC makes the following representations and warranties to TIG, each of which is true and correct as of the date of signing this Agreement and shall be true and correct as of the Closing Date:

- a. The monetary consideration tendered by TIG for commutation of the Commuted Claims was primarily based upon its review of information supplied by PBC. PBC has not knowingly withheld from TIG any facts, information, or documents material to the valuation of any Commuted Claim, and none of the information, facts, or documents supplied by PBC to TIG pertaining to any Commuted Claim contained known errors or inaccurate information material to the valuation of any Commuted Claim.
- b. PBC has the full power and authority to execute, perform, and deliver this Agreement on behalf of any and all entities, governmental bodies, counties, and/or agencies that were or are insured or otherwise entitled to coverage under the Policy. A correct and complete list of all such entities, governmental bodies, counties, and/or agencies is provided in Exhibit 1 and incorporated herein.

4. TIG's Representations and Warranties. As a material inducement to PBC entering into this Agreement, TIG makes the following representations and warranties to PBC, each of which is true and correct as of the date of signing this Agreement and shall be true and correct as of the Closing Date:

- a. TIG has not knowingly withheld from PBC any facts, information, or documents material to the valuation of any Commuted Claim, and none of the information,

facts, or documents supplied by TIG to PBC pertaining to any Commuted Claim contained known errors or inaccurate information material to the valuation of any Commuted Claim.

- b. TIG is the successor-in-interest to Transamerica Insurance Company with respect to the Policy and has the full power and authority to execute, perform, and deliver this Agreement.

5. Joint Representations and Warranties. As a material inducement to the Parties entering into this Agreement, each Party makes the following representations and warranties to the other Party, each of which is true and correct as of the date of signing this Agreement and shall be true and correct as of the Closing Date:

- a. Each Party warrants and represents that it is duly organized, validly existing, and in good standing under the laws of the state of its organization.
- b. Each Party warrants and represents that it has full legal power and authority to enter into and perform this Agreement and to take all necessary and reasonable actions herein, free of any rights or interests of third parties. Each Party further warrants and represents that it does not need to obtain any consent, approval or action of, or make any filing with or give any notice to, any person or entity or any public governmental or judicial authority or that if any such consent, approval, action, filing, or notice is required, it has been duly provided and fulfilled so that no contingencies to the efficacy of this Agreement exist.
- c. Each Party warrants and represents that this Agreement is valid, binding, and fully enforceable against it in accordance with the terms of the Agreement.
- d. Each Party warrants and represents that the execution and delivery of this Agreement does not conflict with, violate, or constitute a default under the terms, conditions, or provisions of any agreement or instrument to which it is a party.
- e. Each Party warrants and represents that the execution and delivery of this Agreement does not conflict with any law, judgment, or order of which it is aware.

6. Warranties and Representations of Signatories. The signatories below, and each of them, warrants and represents to the Parties that he or she has the full power and authority to execute and deliver this Agreement. Each signatory further represents that he or she does not require or need to obtain any consent, approval, or action of, or make any filing with, or give any notice to, any other entity or any public governmental or judicial authority.

7. Confidentiality - Settlement Discussions. The Parties are familiar with Section 90.408, Florida Statutes (2012), which provides, in part, that an offer to compromise a claim is inadmissible if offered to prove liability of the original loss. The Parties hereby stipulate that all discussions, communications, and exchanges of information and documents that have occurred

in the past and that pertain to the process of negotiating and effecting a commutation under the Policy (hereinafter referred to as the "Process") shall be permanently kept in total and complete confidence and that no direct or indirect use of anything said or done in the course of the Process shall be admissible or otherwise be introduced into evidence in any lawsuit of any type, or in any other arbitral, judicial, or administrative proceeding. Notwithstanding the foregoing, to the extent that either Party produced to the other Party documents that were not prepared for purposes of the Process (by way of example and not limitation, medical records, loss runs, and reinsurance reports), such production shall have no effect upon the admissibility of such documents in any potential future litigation. As to such documents, the receiving Party shall be permitted to argue that such documents are admissible evidence, and the producing Party shall not be deemed to have waived any right to argue that such documents are protected by privilege or other exclusion to admissibility. Notwithstanding the foregoing, nothing in this section shall be interpreted to limit the right of any Party to introduce evidence in a proceeding to interpret and/or enforce this Agreement.

8. Extra-Contractual Liability/Bad Faith. Section 90.408, Florida Statutes (2012), does not prohibit the admission of offers to compromise to prove extra-contractual liability/bad faith. See Seminole County v. Coral Gables Federal Savings and Loan Association, 691 So.2d 614 (Fla. 5th DCA 1997). Nevertheless, the Parties hereby expressly waive any and all rights to prove or otherwise introduce evidence to prove extra-contractual liability, tort liability, bad faith, violation of the covenant of good faith and fair dealing, breach of contract, violation of any claim handling statutes and/or regulations, including without limitation § 626.951, *et seq.*, Florida Statutes (2012), by virtue of any acts, omissions, communications, or other conduct that led up to this Agreement.

9. Attorneys' Fees. In any litigation or other proceeding by which a Party seeks to enforce its rights relating to this Agreement (whether in contract, tort, or both), seeks an interpretation of this Agreement, or seeks a declaration of rights or obligations under this Agreement, or any proceeding brought because of an alleged dispute, breach, default, or misrepresentation in connection with any of the provisions of this Agreement, each Party shall bear its own attorneys' fees and costs incurred in such proceeding.

10. Miscellaneous. This Agreement contains the entire agreement between the Parties hereto with regard to the subject matter hereof, and all prior negotiation or discussions of any type are subsumed in this Agreement. This Agreement shall be binding upon the Parties' successors and assigns in all respects. Each Party has participated fully in the review and revision of this Agreement. Hence, no ambiguity herein shall be resolved presumptively against any Party. The headings of paragraphs and sections in this Agreement are for convenience only. The headings form no part of this Agreement and shall not affect its interpretation.

11. Waiver. No waiver of a breach, failure, or right contained in or granted by the provisions of this Agreement shall be effective unless it is in writing and signed by the Party waiving the breach, failure, or right. No waiver of any breach, failure, or right shall be deemed a waiver of any other breach, failure, or right, whether or not similar, nor shall any waiver constitute a continuing waiver, unless a writing so specifies.

12. Severability. Should any part, term or provision of this Agreement, except for sections 2, 3, 4, 5, 6 and 8, be decided, declared, or found by any court, administrative law judge, tribunal, workers' compensation judge, administrative agency, or regulatory agency having jurisdiction over either Party or this Agreement to be illegal or in conflict with any laws, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms, portions or provisions shall be deemed severable and shall not be affected thereby, providing such remaining parts, terms, portions or provisions can be construed in substance to constitute the agreement the Parties intended to enter into in the first instance. The Parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the extent possible, the economic, business and other purposes of such void or unenforceable provision. Should any part, term, or provision of sections 2, 3, 4, 5, 6 or 8, be found unenforceable, either Party shall have the right to rescind this Agreement.

13. No Third-Party Beneficiaries. This Agreement is made solely for the benefit of the Parties, and no other person or entity shall have or acquire any right by virtue of this Agreement.

14. Cooperation. The Parties agree to cooperate fully and to execute any and all additional or supplemental documents, and to take all additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

15. Construction and Venue. This Agreement shall be governed, construed, and interpreted in accordance with the laws of the State of Florida (without respect to principles of conflict of laws), and venue for the resolution of disputes arising under or related to this Agreement in any way shall lie solely and exclusively with the 15th Judicial Circuit of Florida or the U.S. District Court of the Southern District of Florida.

16. Modification. This Agreement may be amended at any time and from time to time, but any amendment must be in writing and signed by each Party to be bound.

17. Compliance with Law. In handling, administering, and/or paying the Commuted Claims, PBC shall comply with all applicable ordinances, laws, caselaw, statutes, and regulations governing such conduct, including without limitation all workers' compensation and occupational disease cases, laws, and regulations.

18. Rescission. Neither the execution of this Agreement nor the negotiations that preceded same shall operate as a waiver or estoppel of any coverage claims or coverage defenses arising under the Policy. In the event of a rescission of this Agreement, whether pursuant to section 12 or otherwise, PBC shall be free to assert any and all coverage claims, and TIG shall be free to assert any and all coverage defenses.

19. Survival. The obligations arising under and the terms of sections 1-19 of this Agreement shall survive the termination, cancellation, or rescission of this Agreement, except that the terms of section 2 shall not survive a rescission of this Agreement.

SIGNED EFFECTIVE THE DATE FIRST WRITTEN ABOVE

IN WITNESS WHEREOF, the Board of County Commissioners of Palm Beach County, Florida has made and executed this Agreement on behalf of the COUNTY and TIG has hereunto set its hand the day and year above written.

ATTEST:
SHARON R. BOCK
CLERK AND COMPTROLLER

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS:

By: _____
Deputy Clerk

By: _____
Mayor

WITNESS:

TIG INSURANCE COMPANY:

Bruce R. Klinker
Signature

TIG Insurance Company
Company Name

Bruce R. Klinker (TIG)
Name (type or print)

Mary Ann Hinson
Signature

Gary Hinson
Typed Name

Vice President Claims
Title

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY (corp. seal)

By: William J. Hagan
County Attorney

APPROVED AS TO TERMS
AND CONDITIONS

By: Nancy J. Bolton
Department Director

Exhibit 1

“Intentionally Left Blank”