
WEST VIRGINIA CODE CHAPTER 33
ARTICLE 40

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§33-40-1. Definitions.

As used in this article, these terms have the following meanings:

- (a) "Adjusted RBC report" means an RBC report which has been adjusted by the commissioner in accordance with subsection (e), section two of this article.
- (b) "Corrective order" means an order issued by the commissioner specifying corrective actions which the commissioner has determined are required.
- (c) "Domestic insurer" means any insurance company, farmers' mutual fire insurance company or HMO domiciled in this state.
- (d) "Foreign insurer" means any insurance company which is licensed to do business in this state under article three of this chapter but is not domiciled in this state.
- (e) "NAIC" means the National Association of Insurance Commissioners.
- (f) "Life and/or health insurer" means any insurance company licensed under article three of this chapter or a licensed property and casualty insurer writing only accident and health insurance.
- (g) "Property and casualty insurer" means any insurance company licensed under article three of this chapter or any farmers' mutual fire insurance company licensed under article twenty-two of this chapter, but may not include monoline mortgage guaranty insurers, financial guaranty insurers and title insurers.
- (h) "Negative trend" means, with respect to a life and/or health insurer, negative trend over a period of time, as determined in accordance with the trend test calculation included in the RBC instructions.
- (i) "RBC instructions" means the RBC report, including risk-based capital instructions adopted by the NAIC, as the RBC instructions may be amended by the NAIC, from time to time, in accordance with the procedures adopted by the NAIC.
- (j) "RBC level" means an insurer's company action level RBC, regulatory action level RBC, authorized control level RBC, or mandatory control level RBC where:
 - (1) "Company action level RBC" means, with respect to any insurer, the product of two and its authorized control level RBC;
 - (2) "Regulatory action level RBC" means the product of one and one-half and its authorized control level RBC;
 - (3) "Authorized control level RBC" means the number determined under the risk-based capital formula in accordance with the RBC instructions;

(4) "Mandatory control level RBC" means the product of seven-tenths and the authorized control level RBC.

(k) "RBC plan" means a comprehensive financial plan containing the elements specified in subsection (b), section three of this article. If the commissioner rejects the RBC plan and it is revised by the insurer, with or without the commissioner's recommendation, the plan shall be called the revised RBC plan.

(l) "RBC report" means the report required in section two of this article.

(m) "Total adjusted capital" means the sum of:

(1) An insurer's statutory capital and surplus as determined in accordance with the statutory accounting applicable to the financial statements required to be filed under section fourteen, article four of this chapter; and

(2) Any other items required by the RBC instructions.

§33-40-2. RBC reports.

(a) Every domestic insurer, on or prior to each March 1 (the filing date), shall prepare and submit to the commissioner a report of its RBC levels as of the end of the calendar year just ended, in a form and containing the information required by the RBC instructions. In addition, every domestic insurer shall file its RBC report:

(1) With the NAIC in accordance with the RBC instructions; and

(2) With the Insurance Commissioner in any state in which the insurer is authorized to do business, if the Insurance Commissioner has notified the insurer of its request in writing, in which case the insurer shall file its RBC report not later than the later of:

(A) Fifteen days from the receipt of notice to file its RBC report with that state; or

(B) The filing date.

(b) A life and health insurer's RBC shall be determined in accordance with the formula set forth in the RBC instructions. The formula shall take into account (and may adjust for the covariance between):

(1) The risk with respect to the insurer's assets;

(2) The risk of adverse insurance experience with respect to the insurer's liabilities and obligations;

(3) The interest rate risk with respect to the insurer's business; and

(4) All other business risks and any other relevant risks set forth in the RBC instructions determined in each case by applying the factors in the manner set forth in the RBC instructions.

(c) A property and casualty insurer's RBC shall be determined in accordance with the applicable formula set forth in the RBC instructions. The formula shall take into account (and may adjust for the covariance between), determined in each case by applying the factors in the manner set forth in the RBC instructions:

(1) Asset risk;

(2) Credit risk;

(3) Underwriting risk; and

(4) All other business risks and any other relevant risks as are set forth in the RBC instructions.

(d) An excess of capital over the amount produced by the risk-based capital requirements

contained in this article and the formulas, schedules and instructions referenced in this article is desirable in the business of insurance. Accordingly, insurers and HMOs should seek to maintain capital above the RBC levels required by this article. Additional capital is used and useful in the insurance business and helps to secure insurers against various risks inherent in, or affecting, the business of insurance and not accounted for or only partially measured by the risk-based capital requirements contained in this article.

(e) If a domestic insurer files an RBC report which, in the judgment of the commissioner is inaccurate, then the commissioner shall adjust the RBC report to correct the inaccuracy and shall notify the insurer of the adjustment. The notice shall contain a statement of the reason for the adjustment. An RBC report that is adjusted is referred to as an Adjusted RBC Report.

§33-40-3. Company action level event.

(a) "Company action level event" means any of the following events:

(1) The filing of an RBC report by an insurer which indicates that:

(A) The insurer's total adjusted capital is greater than or equal to its regulatory action level RBC, but less than its company action level RBC;

(B) If a life and/or health insurer, the insurer has total adjusted capital which is greater than or equal to its company action level RBC, but less than the product of its authorized control level RBC and three and has a negative trend; or

(C) If a property and casualty insurer, the insurer has total adjusted capital which is greater than or equal to its company action level RBC, but less than the product of its authorized control level RBC and three and triggers the trend test determined in accordance with the trend test calculation included in the property and casualty RBC instructions;

(2) The notification by the commissioner to the insurer of an adjusted RBC report that indicates an event in subdivision (1) of this subsection, provided the insurer does not challenge the adjusted RBC report under section seven of this article; or

(3) If, pursuant to section seven of this article, an insurer challenges an adjusted RBC report that indicates the event in subdivision (1) of this subsection, the notification by the commissioner to the insurer that the commissioner has, after a hearing, rejected the insurer's challenge.

(b) If there is a company action level event, the insurer shall prepare and submit to the commissioner an RBC plan which shall:

(1) Identify the conditions which contribute to the company action level event;

(2) Contain proposals of corrective actions which the insurer intends to take and would be expected to result in the elimination of the company action level event;

(3) Provide projections of the insurer's financial results in the current year and at least the four succeeding years, both in the absence of proposed corrective actions and giving effect to the proposed corrective actions, including projections of statutory operating income, net income, capital and/or surplus. (The projections for both new and renewal business may include separate projections for each major line of business and separately identify each significant income, expense and benefit component);

(4) Identify the key assumptions impacting the insurer's projections and the sensitivity of the projections to the assumptions; and

(5) Identify the quality of, and problems associated with, the insurer's business, including,

but not limited to, its assets, anticipated business growth and associated surplus strain, extraordinary exposure to risk, mix of business and use of reinsurance, if any, in each case.

(c) The RBC plan shall be submitted:

(1) Within forty-five days of the company action level event; or

(2) If the insurer challenges an adjusted RBC report pursuant to section seven of this article, within forty-five days after notification to the insurer that the commissioner has, after a hearing, rejected the insurer's challenge.

(d) Within sixty days after the submission by an insurer of an RBC plan to the commissioner, the commissioner shall notify the insurer whether the RBC plan may be implemented or is, in the judgment of the commissioner, unsatisfactory. If the commissioner determines the RBC plan is unsatisfactory, the notification to the insurer shall set forth the reasons for the determination and may set forth proposed revisions which will render the RBC plan satisfactory in the judgment of the commissioner. Upon notification from the commissioner, the insurer shall prepare a revised RBC plan, which may incorporate by reference any revisions proposed by the commissioner, and shall submit the revised RBC plan to the commissioner:

(1) Within forty-five days after the notification from the commissioner; or

(2) If the insurer challenges the notification from the commissioner under section seven of this article, within forty-five days after a notification to the insurer that the commissioner has, after a hearing, rejected the insurer's challenge.

(e) If there is a notification by the commissioner to an insurer that the insurer's RBC plan or revised RBC plan is unsatisfactory, the commissioner may, at the commissioner's discretion, subject to the insurer's right to a hearing under section seven of this article, specify in the notification that the notification constitutes a regulatory action level event.

(f) Every domestic insurer that files an RBC plan or revised RBC plan with the commissioner shall file a copy of the RBC plan or revised RBC plan with the Insurance Commissioner in any state in which the insurer is authorized to do business if:

(1) The state has an RBC provision substantially similar to subsection (a), section eight of this article; and

(2) The Insurance Commissioner of that state has notified the insurer of its request for the filing in writing, in which case the insurer shall file a copy of the RBC plan or revised RBC plan in that state no later than the later of:

(A) Fifteen days after the receipt of notice to file a copy of its RBC plan or revised RBC plan with the state; or

(B) The date on which the RBC plan or revised RBC plan is filed under subsections (c) and (d) of this section.

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§33-40-4. Regulatory action level event.

(a) "Regulatory action level event" means, with respect to any insurer, any of the following events:

(1) The filing of an RBC report by the insurer which indicates that the insurer's total adjusted capital is greater than or equal to its authorized control level RBC but less than its regulatory action level RBC;

(2) The notification by the commissioner to an insurer of an adjusted RBC report that indicates the event in subdivision (1) of this subsection, provided the insurer does not challenge the adjusted RBC report under section seven of this article;

(3) If, pursuant to section seven of this article, the insurer challenges an adjusted RBC report that indicates the event in subdivision (1) of this subsection, the notification by the commissioner to the insurer that the commissioner has, after a hearing, rejected the insurer's challenge;

(4) The failure of the insurer to file an RBC report by the filing date, unless the insurer has provided an explanation for such failure which is satisfactory to the commissioner and has cured the failure within ten days after the filing date;

(5) The failure of the insurer to submit an RBC plan to the commissioner within the time period set forth in subsection (c), section three of this article;

(6) Notification by the commissioner to the insurer that:

(A) The RBC plan or revised RBC plan submitted by the insurer is, in the judgment of the commissioner, unsatisfactory; and

(B) Such notification constitutes a regulatory action level event with respect to the insurer, provided the insurer has not challenged the determination under section seven of this article;

(7) If, pursuant to section seven of this article, the insurer challenges a determination by the commissioner under subdivision (6) of this subsection, the notification by the commissioner to the insurer that the commissioner has, after a hearing, rejected such challenge;

(8) Notification by the commissioner to the insurer that the insurer has failed to adhere to its RBC plan or revised RBC plan, but only if such failure has a substantial adverse effect on the ability of the insurer to eliminate the company action level event in accordance with its RBC plan or revised RBC plan and the commissioner has so stated in the notification, provided the insurer has not challenged the determination under section seven of this article; or

(9) If, pursuant to section seven of this article, the insurer challenges a determination by the commissioner under subdivision (8) of this subsection, the notification by the commissioner

to the insurer that the commissioner has, after a hearing, rejected the challenge.

(b) In the event of a regulatory action level event the commissioner shall:

(1) Require the insurer to prepare and submit an RBC plan or, if applicable, a revised RBC plan;

(2) Perform such examination or analysis as the commissioner deems necessary of the assets, liabilities and operations of the insurer including a review of its RBC plan or revised RBC plan; and

(3) Subsequent to the examination or analysis, issue an order specifying such corrective actions as the commissioner shall determine are required (a "corrective order").

(c) In determining corrective actions, the commissioner may take into account such factors as are deemed relevant with respect to the insurer based upon the commissioner's examination or analysis of the assets, liabilities and operations of the insurer, including, but not limited to, the results of any sensitivity tests undertaken pursuant to the RBC instructions. The RBC plan or revised RBC plan shall be submitted:

(1) Within forty-five days after the occurrence of the regulatory action level event;

(2) If the insurer challenges an adjusted RBC report pursuant to section seven of this article and the challenge is not frivolous in the judgment of the commissioner within forty-five days after the notification to the insurer that the commissioner has, after a hearing, rejected the insurer's challenge; or

(3) If the insurer challenges a revised RBC plan pursuant to section seven of this article and the challenge is not frivolous in the judgment of the commissioner, within forty-five days after the notification to the insurer that the commissioner has, after a hearing, rejected the insurer's challenge.

(d) The commissioner may retain actuaries and investment experts and other consultants as may be necessary in the judgment of the commissioner to review the insurer's RBC plan or revised RBC plan, examine or analyze the assets, liabilities and operations of the insurer and formulate the corrective order with respect to the insurer. The fees, costs and expenses relating to consultants shall be borne by the affected insurer or such other party as directed by the commissioner.

§33-40-5. Authorized control level event.

(a) "Authorized control level event" means any of the following events:

(1) The filing of an RBC report by the insurer which indicates that the insurer's total adjusted capital is greater than or equal to its mandatory control level RBC but less than its authorized control level RBC;

(2) The notification by the commissioner to the insurer of an adjusted RBC report that indicates the event in subdivision (1) of this subsection, provided the insurer does not challenge the adjusted RBC report under section seven of this article;

(3) If, pursuant to section seven of this article, the insurer challenges an adjusted RBC report that indicates the event in subdivision (1) of this subsection, notification by the commissioner to the insurer that the commissioner has, after a hearing, rejected the insurer's challenge;

(4) The failure of the insurer to respond, in a manner satisfactory to the commissioner, to a corrective order (provided the insurer has not challenged the corrective order) under section seven of this article; or

(5) If the insurer has challenged a corrective order under section seven of this article and the commissioner has, after a hearing, rejected the challenge or modified the corrective order, the failure of the insurer to respond, in a manner satisfactory to the commissioner, to the corrective order subsequent to rejection or modification by the commissioner.

(b) In the event of an authorized control level event with respect to an insurer, the commissioner shall:

(1) Take such actions as are required under section four of this article regarding an insurer with respect to which a regulatory action level event has occurred; or

(2) If the commissioner deems it to be in the best interests of the policyholders and creditors of the insurer and of the public, take such actions as are necessary to cause the insurer to be placed under regulatory control under article ten of this chapter. In the event the commissioner takes such actions, the authorized control level event shall be deemed sufficient grounds for the commissioner to take action under said article, and the commissioner shall have the rights, powers and duties with respect to the insurer as are set forth in said article. In the event the commissioner takes actions under this subdivision pursuant to an adjusted RBC report, the insurer shall be entitled to such protections as are afforded to insurers under the provisions of article ten of this chapter pertaining to summary proceedings.

§33-40-6. Mandatory control level event.

(a) "Mandatory control level event" means any of the following events:

(1) The filing of an RBC report which indicates that the insurer's adjusted capital is less than its mandatory control level RBC;

(2) Notification by the commissioner to the insurer of an adjusted RBC report that indicates the event in subdivision (1) of this subsection, provided the insurer does not challenge the adjusted RBC report under section seven of this article; or

(3) If, pursuant to section seven of this article, the insurer challenges an adjusted RBC report that indicates the event in subdivision (1) of this subsection, notification by the commissioner to the insurer or HMO that the commissioner has, after a hearing, rejected the insurer's or HMO's challenge.

(b) If there is a mandatory control level event:

(1) With respect to a life insurer, the commissioner shall take any actions that are necessary to place the insurer under regulatory control under article ten of this chapter. In that event, the mandatory control level event shall be considered sufficient grounds for the commissioner to take action under said article, and the commissioner has the rights, powers and duties with respect to the insurer that are set forth in said article. If the commissioner takes actions pursuant to an adjusted RBC report, the insurer is entitled to the protections of said article pertaining to summary proceedings. Notwithstanding any of the provisions of this subdivision, the commissioner may forego action for up to ninety days after the mandatory control level event if the commissioner finds there is a reasonable expectation that the mandatory control level event may be eliminated within the ninety-day period.

(2) With respect to a property and casualty insurer, the commissioner shall take any actions that are necessary to place the insurer under regulatory control under article ten of this chapter or, in the case of an insurer which is writing no business and which is running-off its existing business, may allow the insurer to continue its run-off under the supervision of the commissioner. In either event, the mandatory control level event shall be considered sufficient grounds for the commissioner to take action under said article and the commissioner has the rights, powers and duties with respect to the insurer that are set forth in said article. If the commissioner takes actions pursuant to an adjusted RBC report, the insurer is entitled to the protections of said article pertaining to summary proceedings. Notwithstanding any of the provisions of this subdivision, the commissioner may forego action for up to ninety days after the mandatory control level event if the commissioner finds there is a reasonable expectation that the mandatory control level event may be eliminated within the ninety-day period.

§33-40-7. Hearings.

Insurers have the right to a confidential departmental hearing, on the record, at which the insurer may challenge any determination or action by the commissioner made pursuant to the provisions of this article. The insurer shall notify the commissioner of its request for a hearing within ten days after receiving notification from the commissioner.

- (a) Notification to an insurer by the commissioner of an adjusted RBC report; or
- (b) Notification to an insurer by the commissioner that:
 - (1) The insurer's RBC plan or revised RBC plan is unsatisfactory; and
 - (2) The notification constitutes a regulatory action level event with respect to the insurer; or
- (c) Notification to any insurer by the commissioner that the insurer has failed to adhere to its RBC plan or revised RBC plan and that the failure has a substantial adverse effect on the ability of the insurer to eliminate the company action level event with respect to the insurer in accordance with its RBC plan or revised RBC plan; or
- (d) Notification to an insurer by the commissioner of a corrective order with respect to the insurer.
- (e) Upon receipt of the insurer's request for a hearing, the commissioner shall set a date for the hearing, which shall be no less than fifteen nor more than forty-five days after the date of the insurer's request.

§33-40-8. Confidentiality; prohibition on announcements, prohibition on use in ratemaking.

(a) All RBC reports (to the extent the information therein is not required to be set forth in a publicly available annual statement schedule) and RBC plans (including the results or report of any examination or analysis of an insurer performed pursuant hereto and any corrective order issued by the commissioner pursuant to examination or analysis) with respect to any domestic insurer or foreign insurer which are filed with the commissioner constitute information that might be damaging to the insurer if made available to its competitors and therefore shall be kept confidential by the commissioner. This information shall not be made public and/or be subject to subpoena, other than by the commissioner and then only for the purpose of enforcement actions taken by the commissioner pursuant to this article or any other provision of the insurance laws of this state. The information required by this article is specifically exempt from the requirements of chapter twenty-nine-b of this code.

(b) It is the judgment of the Legislature that the comparison of an insurer's total adjusted capital to any of its RBC levels is a regulatory tool which may indicate the need for possible corrective action with respect to the insurer, and is not intended as a means to rank insurers generally. Therefore, except as otherwise required under the provisions of this article, the making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing an assertion, representation or statement with regard to the RBC levels of any insurer, or of any component derived in the calculation, by any insurer, agent, broker or other person engaged in any manner in the insurance business would be misleading and is therefore prohibited: Provided, That if any materially false statement with respect to the comparison regarding an insurer's total adjusted capital to its RBC levels (or any of them) or an inappropriate comparison of any other amount to the insurers RBC levels is published in any written publication and the insurer is able to demonstrate to the commissioner with substantial proof the falsity of such statement, or the inappropriateness, as the case may be, then the insurer may publish an announcement in a written publication if the sole purpose of the announcement is to rebut the materially false statement.

(c) It is the further judgment of the Legislature that the RBC instructions, RBC reports, adjusted RBC reports, RBC plans and revised RBC plans are intended solely for use by the commissioner in monitoring the solvency of insurers and the need for possible corrective action with respect to insurers and shall not be used by the commissioner for ratemaking nor considered or introduced as evidence in any rate proceeding nor used by the commissioner to calculate or derive any elements of an appropriate premium level or rate of return for any line of insurance which an insurer or any affiliate is authorized to write.

§33-40-9. Supplemental provisions; rules; exemption.

(a) The provisions of this article are supplemental to any other provisions of the laws of this state and shall not preclude or limit any other powers or duties of the commissioner under such laws, including, but not limited to, article ten of this chapter.

(b) The commissioner may adopt reasonable rules necessary for the implementation of this article.

(c) The commissioner may exempt from the application of this article any domestic property and casualty insurer which:

(1) Writes direct business only in this state;

(2) Writes direct annual premiums of \$2 million or less; and

(3) Assumes no reinsurance in excess of five percent of direct premium written.

(d) A domestic farmers' mutual fire insurance company is exempt from the provisions of this article when:

(1) It writes direct business only in this state;

(2) It writes direct annual premiums of \$2 million or less; and

(3) It assumes no reinsurance in excess of five percent of direct premium written.

§33-40-10. Foreign insurers.

(a) Any foreign insurer shall, upon the written request of the commissioner, submit to the commissioner an RBC report as of the end of the calendar year just ended the later of:

(1) The date an RBC report would be required to be filed by a domestic insurer under this act; or

(2) Fifteen days after the request is received by the foreign insurer.

Any foreign insurer shall, at the written request of the commissioner, promptly submit to the commissioner a copy of any RBC plan that is filed with the Insurance Commissioner of any other state.

(b) In the event of a company action level event, regulatory action level event or authorized control level event with respect to any foreign insurer as determined under the RBC statute applicable in the state of domicile of the insurer (or, if no RBC statute is in force in that state, under the provisions of this article), if the Insurance Commissioner of the state of domicile of the foreign insurer fails to require the foreign insurer to file an RBC plan in the manner specified under that state's RBC statute (or, if no RBC statute is in force in that state, under section three of this article), the commissioner may require the foreign insurer to file an RBC plan with the commissioner. In such event, the failure of the foreign insurer to file an RBC plan with the commissioner shall be grounds to order the insurer to cease and desist from writing new insurance business in this state.

(c) In the event of a mandatory control level event with respect to any foreign insurer, if no domiciliary receiver has been appointed with respect to the foreign insurer under the rehabilitation and liquidation statute applicable in the state of domicile of the foreign insurer, the commissioner may make application to the circuit court of Kanawha County permitted under article ten of this chapter with respect to the liquidation of property of foreign insurers found in this state and the occurrence of the mandatory control level event shall be considered adequate grounds for the application.

§33-40-11. Immunity.

There shall be no liability on the part of, and no cause of action shall arise against, the commissioner or the agency of the Insurance Commission or its employees or agents for any action taken by them in the performance of their powers and duties under this article.

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§33-40-12. Notices.

All notices by the commissioner to an insurer which may result in regulatory action hereunder shall be effective upon dispatch if transmitted by registered or certified mail, or in the case of any other transmission shall be effective upon the insurer's receipt of such notice.

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§33-40-13. Effective date.

This article shall become effective on January 1, 1996.

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