WEST VIRGINIA CODE CHAPTER 33 ARTICLE 40A

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§33-40A-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 (d), 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 health organization" means a health organization domiciled in this state.

(d) "Foreign health organization" means a health organization that is licensed to do business in this state under article twenty-five-a of this chapter but is not domiciled in this state.

(e) "Health organization" means a health maintenance organization licensed under article twenty-five-a of this chapter, limited health service organization licensed under article twenty-five-d of this chapter, provider-sponsored network licensed under article twenty-five-g of this chapter, hospital, medical and dental indemnity or service corporation licensed under article twenty-four of this chapter or other managed care organization licensed under article twenty-five of this chapter. This definition does not include an organization that is licensed under article three of this chapter as either a life or health insurer or a property and casualty insurer and that is otherwise subject to either the life and health or property and casualty RBC requirements.

(f) "NAIC" means the National Association of Insurance Commissioners.

(g) "Negative trend" means a negative trend over a period of time, as determined in accordance with the trend test calculation included in the RBC instructions.

(h) "RBC instructions" means the RBC report including risk-based capital instructions adopted by the NAIC, as these RBC instructions may be amended by the NAIC from time to time in accordance with the procedures adopted by the NAIC.

(i) "RBC level" means a health organization'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 health organization, the product of 2.0 and its authorized control level RBC;

(2) "Regulatory action level RBC" means the product of 1.5 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;

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(4) “Mandatory control level RBC” means the product of .70 and the authorized control level RBC.

(j) “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 health organization, with or without the commissioner’s recommendation, the plan shall be called the “revised RBC plan”.

(k) “RBC report” means the report required in section two of this article.

(l) “Total adjusted capital” means the sum of:

(1) A health organization’s statutory capital and surplus (i.e. net worth) as determined in accordance with the statutory accounting application to the annual financial statements required to be filed under:

(A) Section four, article twenty-four of this chapter;

(B) Section nine, article twenty-five of this chapter;

(C) Section nine, article twenty-five-a of this chapter; or

(D) Section twelve, article twenty-five-d of this chapter; and

(2) Such other items, if any, as the RBC instructions may provide.

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§33-40A-2. RBC reports.

(a) A domestic health organization, 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 such information as is required by the RBC instructions. In addition, a domestic health organization 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 health organization is authorized to do business, if the Insurance Commissioner has notified the health organization of its request in writing, in which case the health organization 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 health organization's RBC shall be determined in accordance with the formula set forth in the RBC instructions. The formula shall take the following 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 such other relevant risks as are set forth in the RBC instructions.

(c) An excess of capital (i.e. net worth) 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 health insurance. Accordingly, health organizations 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 a health organization 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.

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

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§33-40A-3. Company action level event.

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

(1) The filing of an RBC report by a health organization that indicates that the health organization's total adjusted capital is greater than or equal to its regulatory action level RBC but less than its company action level RBC;

(2) If a health organization 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 3.0 and triggers the trend test determined in accordance with the trend test calculation included in the health RBC instructions:

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

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

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

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

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

(3) Provide projections of the health organization's financial results in the current year and at least two succeeding years, both in the absence of proposed corrective actions and giving effect to the proposed corrective actions, including projections of statutory balance sheets, operating income, net income, capital and surplus, and RBC levels. The projections for both new and renewal business might 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 health organization's projections and the sensitivity of the projections to the assumptions; and

(5) Identify the quality of, and problems associated with, the health organization'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:

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

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

(d) Within sixty days after the submission by a health organization of an RBC plan to the commissioner, the commissioner shall notify the health organization whether the RBC plan shall be implemented or is, in the judgment of the commissioner, unsatisfactory. If the commissioner determines the RBC plan is unsatisfactory, the notification to the health organization 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 health organization 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 health organization challenges the notification from the commissioner under section seven of this article, within forty-five days after a notification to the health organization that the commissioner has, after a hearing, rejected the health organization's challenge.

(e) If there is a notification by the commissioner to a health organization that the health organization's RBC plan or revised RBC plan is unsatisfactory, the commissioner may, subject to the health organization'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 health organization 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 health organization 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 health organization of its request for the filing in writing, in which case the health organization 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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§33-40A-4. Regulatory action level event.

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

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

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

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

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

(5) The failure of the health organization 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 health organization that:

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

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

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

(8) Notification by the commissioner to the health organization that the health organization has failed to adhere to its RBC plan or revised RBC plan, but only if the failure has a substantial adverse effect on the ability of the health organization 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 health organization has not challenged the determination under section seven of this article; or

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(9) If, pursuant to section seven of this article, the health organization challenges a determination by the commissioner under subdivision (8) of this subsection, the notification by the commissioner to the health organization that the commissioner has, after a hearing, rejected the challenge.

(b) If there is a regulatory action level event, the commissioner shall:

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

(2) Perform such examination or analysis as the commissioner considers necessary of the assets, liabilities and operations of the health organization 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 determines are required (a corrective order).

(c) In determining corrective actions, the commissioner may take into account factors the commissioner deems relevant with respect to the health organization based upon the commissioner's examination or analysis of the assets, liabilities and operations of the health organization, 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 health organization 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 health organization that the commissioner has, after a hearing, rejected the health organization's challenge; or

(3) If the health organization 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 health organization that the commissioner has, after a hearing, rejected the health organization'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 health organization's RBC plan or revised RBC plan, examine or analyze the assets, liabilities and operations (including contractual relationships) of the health organization and formulate the corrective order with respect to the health organization. The fees, costs and expenses relating to consultants shall be borne by the affected health organization or such other party as directed by the commissioner.

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§33-40A-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 health organization that indicates that the health organization'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 health organization of an adjusted RBC report that indicates the event in subdivision (1) of this subsection, if the health organization does not challenge the adjusted RBC report under section seven of this article;

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

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

(5) If the health organization 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 health organization to respond, in a manner satisfactory to the commissioner, to the corrective order subsequent to rejection or modification by the commissioner.

(b) If there is an authorized control level event with respect to a health organization, the commissioner shall:

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

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

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§33-40A-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 health organization's total adjusted capital is less than its mandatory control level RBC;

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

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

(b) If it is a mandatory control level event, the commissioner shall take such actions as are necessary to place the health organization under regulatory control under article ten of this chapter. In that event, the mandatory control level event is sufficient grounds for the commissioner to take action under article ten of this chapter, and the commissioner has the rights, powers and duties with respect to the health organization as are set forth in article ten of this chapter. If the commissioner takes actions pursuant to an adjusted RBC report, the health organization is entitled to the protections of article ten of this chapter pertaining to summary proceedings. Notwithstanding any of the foregoing, 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.

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§33-40A-7. Hearings.

Upon the occurrence of any of the following events the health organization has the right to a confidential departmental hearing, on a record, at which the health organization may challenge any determination or action by the commissioner. The health organization shall notify the commissioner of its request for a hearing within five days after the notification by the commissioner under subsection (a), (b), (c) or (d) of this section. Upon receipt of the health organization's request for a hearing, the commissioner shall set a date for the hearing, which shall be no less than ten nor more than thirty days after the date of the health organization's request. The events include:

(a) Notification to a health organization by the commissioner of an adjusted RBC report;

(b) Notification to a health organization by the commissioner that:

(1) The health organization's RBC plan or revised RBC plan is unsatisfactory; and

(2) Notification constitutes a regulatory action level event with respect to the health organization;

(c) Notification to a health organization by the commissioner that the health organization 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 health organization to eliminate the company action level event with respect to the health organization in accordance with its RBC plan or revised RBC plan; or

(d) Notification to a health organization by the commissioner of a corrective order with respect to the health organization.

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

(a) All RBC reports (to the extent the information 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 a health organization performed pursuant to this statute and any corrective order issued by the commissioner pursuant to examination or analysis) with respect to a domestic health organization or foreign health organization that are in the possession or control of the commissioner are confidential by law and privileged, are not subject to the provisions of chapter twenty-nine-b of this code, are not subject to subpoena, and are not subject to discovery or admissible in evidence in any private civil action. However, the commissioner may use the documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties.

(b) Neither the commissioner nor any person who received documents, materials or other information while acting under the authority of the commissioner are permitted or required to testify in any private civil action concerning any confidential documents, materials or information subject to subsection (a) of this section.

(c) In order to assist in the performance of the commissioner's duties, the commissioner:

(1) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to subsection (a) of this section, with other state, federal and international regulatory agencies, with the NAIC and its affiliates and subsidiaries, and with state, federal and international law-enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material or other information;

(2) May receive documents, materials or information, including otherwise confidential and privileged documents, materials or information, from the NAIC and its affiliates and subsidiaries, and from regulatory and law-enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and

(3) May enter into agreements governing sharing and use of information consistent with this subsection.

(d) No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information may occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in subdivision (3), subsection (c) of this section.

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(e) It is the finding of the Legislature that the comparison of a health organization's total adjusted capital to any of its RBC levels is a regulatory tool which may indicate the need for corrective action with respect to the health organization, and is not intended as a means to rank health organizations 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 a 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 health organization, or of any component derived in the calculation, by any health organization, 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 a health organization's total adjusted capital to its RBC levels (or any of them) or an inappropriate comparison of any other amount to the health organization's RBC levels is published in any written publication and the health organization is able to demonstrate to the commissioner with substantial proof the falsity of the statement, or the inappropriateness, as the case may be, then the health organization may publish an announcement in a written publication if the sole purpose of the announcement is to rebut the materially false statement.

(f) It is the further finding 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 health organizations and the need for possible corrective action with respect to health organizations 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 that a health organization or any affiliate is authorized to write.

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

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

(b) The commissioner may propose rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code, as are necessary to effectuate the purposes of this article and to prevent circumvention and evasion thereof.

(c) The commissioner may exempt from the application of this article a domestic health organization that:

(1) Writes direct business only in this state;

(2) Assumes no reinsurance in excess of five percent of direct premiums written; and

(3) Writes direct annual premiums for comprehensive medical business of $2 million or less; or

(4) Is a limited health service organization that covers less than two thousand lives.

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§33-40A-10. Foreign health organizations.

(a)(1) A foreign health organization, upon the written request of the commissioner, shall submit to the commissioner an RBC report as of the end of the calendar year just ended, not later than the later of:

(A) The date an RBC report would be required to be filed by a domestic health organization under this article; or

(B) Fifteen days after the request is received by the foreign health organization.

(2) A foreign health organization, at the written request of the commissioner, shall promptly submit to the commissioner a copy of any RBC plan that is filed with the insurance commissioner of any other state.

(b) If there is a company action level event, regulatory action level event or authorized control level event with respect to a foreign health organization as determined under the RBC statute applicable in the state of domicile of the health organization (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 health organization fails to require the foreign health organization 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 health organization to file an RBC plan with the commissioner. The failure of the foreign health organization to file an RBC plan with the commissioner is grounds to order the health organization to cease and desist from writing new insurance business in this state.

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

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§33-40A-11. Immunity.

There is no liability on the part of, and no cause of action may arise against, the commissioner or the West Virginia Office of the Insurance Commissioner 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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§33-40A-12. Notices.

All notices by the commissioner to a health organization that may result in regulatory action under this article are effective upon dispatch if transmitted by registered or certified mail, or in the case of any other transmission shall be effective upon the health organization's receipt of notice.

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