

CHAPTER 26.1-03.2

RISK-BASED CAPITAL FOR HEALTH ORGANIZATIONS

26.1-03.2-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "Adjusted risk-based capital report" means a risk-based capital report which has been adjusted by the commissioner in accordance with section 26.1-03.2-02.
2. "Corrective order" means an order issued by the commissioner specifying corrective actions which the commissioner has determined are required.
3. "Domestic health organization" means a health organization domiciled in this state.
4. "Foreign health organization" means a health organization that is licensed to do business in this state but is not domiciled in this state.
5. "Health organization" means a health maintenance organization, prepaid limited health service organization, nonprofit health service corporation, or other managed care organization licensed by the commissioner to do business in this state. "Health organization" does not include an organization that is licensed as either a life and health insurer or a property and casualty insurer that is otherwise subject to either the life or property and casualty risk-based capital requirements.
6. "Risk-based capital instructions" means the risk-based capital report including risk-based capital instructions adopted by the national association of insurance commissioners, as these risk-based capital instructions may be amended by the national association of insurance commissioners from time to time in accordance with the procedures adopted by the national association of insurance commissioners.
7. "Risk-based capital level" means a health organization's company action level risk-based capital, regulatory action level risk-based capital, authorized control level risk-based capital, or mandatory control level risk-based capital and:
 - a. "Authorized control level risk-based capital" means the number determined under the risk-based capital formula in accordance with the risk-based capital instructions.
 - b. "Company action level risk-based capital" means, with respect to any health organization, the product of 2.0 and its authorized control level risk-based capital.
 - c. "Mandatory control level risk-based capital" means the product of .70 and the authorized control level risk-based capital.
 - d. "Regulatory action level risk-based capital" means the product of 1.5 and its authorized control level risk-based capital.
8. "Risk-based capital plan" means a comprehensive financial plan containing the elements specified in subsection 2 of section 26.1-03.2-03. If the commissioner rejects the risk-based capital plan, and it is revised by the health organization, with or without the commissioner's recommendation, the plan must be called the "revised risk-based capital plan".
9. "Risk-based capital report" means the report required in section 26.1-03.2-02.
10. "Total adjusted capital" means the sum of:
 - a. A health organization's statutory capital and surplus, net worth, as determined in accordance with the statutory accounting applicable to the annual financial statements required to be filed under section 26.1-03-07 or, in the case of a health maintenance organization, section 26.1-18.1-08; and
 - b. Such other items, if any, as the risk-based capital instructions may provide.

26.1-03.2-02. Risk-based capital reports.

1. On or before each March first, a domestic health organization shall prepare and submit to the commissioner a report of its risk-based capital levels as of the end of the calendar year just ended, in a form and containing such information as is required by the risk-based capital instructions. In addition, a domestic health organization shall file its risk-based capital report:
 - a. With the national association of insurance commissioners in accordance with the risk-based capital instructions; and

- b. 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 risk-based capital report not later than the later of:
 - (1) Fifteen days from the receipt of notice to file its risk-based capital report with that state; or
 - (2) The filing date.
2. A health organization's risk-based capital must be determined in accordance with the formula set forth in the risk-based capital instructions. The formula must take the following into account, and may adjust for the covariance between, as determined in each case by applying the factors in the manner set forth in the risk-based capital instructions:
 - a. Asset risk;
 - b. Credit risk;
 - c. Underwriting risk; and
 - d. All other business risks and such other relevant risks as are set forth in the risk-based capital instructions.
3. Net worth over the amount produced by the risk-based capital requirements contained in this chapter and the formulas, schedules, and instructions referenced in this chapter is desirable in the business of health insurance. Accordingly, health organizations should seek to maintain capital above the risk-based capital levels required by this chapter. 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 chapter.
4. If a domestic health organization files a risk-based capital report that in the judgment of the commissioner is inaccurate, then the commissioner shall adjust the risk-based capital report to correct the inaccuracy and shall notify the health organization of the adjustment. The notice must contain a statement of the reason for the adjustment. A risk-based capital report as so adjusted is referred to as an "adjusted risk-based capital report".

26.1-03.2-03. Company action level event.

1. "Company action level event" means any of the following events:
 - a. The filing of a risk-based capital report by a health organization which indicates that:
 - (1) The health organization's total adjusted capital is greater than or equal to its regulatory action level risk-based capital but less than its company action level risk-based capital; or
 - (2) If a health organization has total adjusted capital that is greater than or equal to its company action level risk-based capital but less than the product of its authorized control level risk-based capital and three and triggers the trend test determined in accordance with the trend test calculation included in the health risk-based capital instructions;
 - b. Notification by the commissioner to the health organization of an adjusted risk-based capital report that indicates an event in subdivision a, provided the health organization does not challenge the adjusted risk-based capital report under section 26.1-03.2-07; or
 - c. If, pursuant to section 26.1-03.2-07, a health organization challenges an adjusted risk-based capital report that indicates the event in subdivision a, the notification by the commissioner to the health organization that the commissioner, after a hearing, has rejected the health organization's challenge.
2. In the event of a company action level event, the health organization shall prepare and submit to the commissioner a risk-based capital plan that:
 - a. Identifies the conditions that contribute to the company action level event;

- b. Contains proposals of corrective actions which the health organization intends to take and which would be expected to result in the elimination of the company action level event;
 - c. Provides projections of the health organization's financial results in the current year and at least the 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 risk-based capital levels. 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;
 - d. Identifies the key assumptions impacting the health organization's projections and the sensitivity of the projections to the assumptions; and
 - e. Identifies the quality of, and problems associated with, the health organization's business, including 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.
- 3. The risk-based capital plan must be submitted:
 - a. Within forty-five days of the company action level event; or
 - b. If the health organization challenges an adjusted risk-based capital report pursuant to section 26.1-03.2-07, within forty-five days after notification to the health organization that the commissioner, after a hearing, has rejected the health organization's challenge.
- 4. Within sixty days after the submission by a health organization of a risk-based capital plan to the commissioner, the commissioner shall notify the health organization whether the risk-based capital plan shall be implemented or is, in the judgment of the commissioner, unsatisfactory. If the commissioner determines the risk-based capital plan is unsatisfactory, the notification to the health organization must set forth the reasons for the determination and may set forth proposed revisions that will render the risk-based capital plan satisfactory in the judgment of the commissioner. Upon notification from the commissioner, the health organization shall prepare a revised risk-based capital plan, which may incorporate by reference any revisions proposed by the commissioner, and shall submit the revised risk-based capital plan to the commissioner:
 - a. Within forty-five days after the notification from the commissioner; or
 - b. If the health organization challenges the notification from the commissioner under section 26.1-03.2-07, within forty-five days after a notification to the health organization that the commissioner has, after a hearing, rejected the health organization's challenge.
- 5. In the event of a notification by the commissioner to a health organization that the health organization's risk-based capital plan or revised risk-based capital plan is unsatisfactory, the commissioner, subject to the health organization's right to a hearing under section 26.1-03.2-07, may specify in the notification that the notification constitutes a regulatory action level event.
- 6. Every domestic health organization that files a risk-based capital plan or revised risk-based capital plan with the commissioner shall file a copy of the risk-based capital plan or revised risk-based capital plan with the insurance commissioner in any state in which the health organization is authorized to do business if:
 - a. The state has a risk-based capital provision substantially similar to subsection 1 of section 26.1-03.2-08; and
 - b. 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 risk-based capital plan or revised risk-based capital plan in that state no later than the later of:
 - (1) Fifteen days after the receipt of notice to file a copy of its risk-based capital plan or revised risk-based capital plan with the state; or

- (2) The date on which the risk-based capital plan or revised risk-based capital plan is filed under subsections 3 and 4.

26.1-03.2-04. Regulatory action level event.

1. "Regulatory action level event" means, with respect to a health organization, any of the following events:
 - a. The filing of a risk-based capital report by the health organization which indicates that the health organization's total adjusted capital is greater than or equal to its authorized control level risk-based capital but less than its regulatory action level risk-based capital;
 - b. Notification by the commissioner to a health organization of an adjusted risk-based capital report that indicates the event in subdivision a, provided the health organization does not challenge the adjusted risk-based capital report under section 26.1-03.2-07;
 - c. If, pursuant to section 26.1-03.2-07, the health organization challenges an adjusted risk-based capital report that indicates the event in subdivision a, the notification by the commissioner to the health organization that the commissioner, after a hearing, has rejected the health organization's challenge;
 - d. The failure of the health organization to file a risk-based capital report by the filing date, unless the health organization has provided an explanation for the failure which is satisfactory to the commissioner and has cured the failure within ten days after the filing date;
 - e. The failure of the health organization to submit a risk-based capital plan to the commissioner within the time period set forth in subsection 3 of section 26.1-03.2-03;
 - f. Notification by the commissioner to the health organization that:
 - (1) The risk-based capital plan or revised risk-based capital plan submitted by the health organization is, in the judgment of the commissioner, unsatisfactory; and
 - (2) Notification constitutes a regulatory action level event with respect to the health organization, provided the health organization has not challenged the determination under section 26.1-03.2-07;
 - g. If, pursuant to section 26.1-03.2-07, the health organization challenges a determination by the commissioner under subdivision f, the notification by the commissioner to the health organization that the commissioner, after a hearing, has rejected the challenge;
 - h. Notification by the commissioner to the health organization that the health organization has failed to adhere to its risk-based capital plan or revised risk-based capital 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 risk-based capital plan or revised risk-based capital plan and the commissioner has so stated in the notification, provided the health organization has not challenged the determination under section 26.1-03.2-07; or
 - i. If, pursuant to section 26.1-03.2-07, the health organization challenges a determination by the commissioner under subdivision h, the notification by the commissioner to the health organization that the commissioner, after a hearing, has rejected the challenge.
2. In the event of a regulatory action level event the commissioner shall:
 - a. Require the health organization to prepare and submit a risk-based capital plan or, if applicable, a revised risk-based capital plan;
 - b. Perform such examination or analysis as the commissioner deems necessary of the assets, liabilities, and operations of the health organization, including a review of its risk-based capital plan or revised risk-based capital plan; and
 - c. Subsequent to the examination or analysis, issue an order specifying such corrective actions as the commissioner determines are required.

3. In determining corrective actions, the commissioner may take into account factors the commissioner deems relevant with respect to the health organization risk based upon the commissioner's examination or analysis of the assets, liabilities, and operations of the health organization, including the results of any sensitivity tests undertaken pursuant to the risk-based capital instructions. The risk-based capital plan or revised risk-based capital plan must be submitted:
 - a. Within forty-five days after the occurrence of the regulatory action level event;
 - b. If the health organization challenges an adjusted risk-based capital report pursuant to section 26.1-03.2-07 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
 - c. If the health organization challenges a revised risk-based capital plan pursuant to section 26.1-03.2-07 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.
4. 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 risk-based capital plan or revised risk-based capital 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 must be borne by the affected health organization or such other party as directed by the commissioner.

26.1-03.2-05. Authorized control level event.

1. "Authorized control level event" means any of the following events:
 - a. The filing of a risk-based capital report by the health organization which indicates that the health organization's total adjusted capital is greater than or equal to its mandatory control level risk-based capital but less than its authorized control level risk-based capital;
 - b. The notification by the commissioner to the health organization of an adjusted risk-based capital report that indicates the event in subdivision a, provided the health organization does not challenge the adjusted risk-based capital report under section 26.1-03.2-07;
 - c. If, pursuant to section 26.1-03.2-07, the health organization challenges an adjusted risk-based capital report that indicates the event in subdivision a, notification by the commissioner to the health organization that the commissioner, after a hearing, has rejected the health organization's challenge;
 - d. The failure of the health organization to respond, in a manner satisfactory to the commissioner, to a corrective order, provided the health organization has not challenged the corrective order under section 26.1-03.2-07; or
 - e. If the health organization has challenged a corrective order under section 26.1-03.2-07 and the commissioner, after a hearing, has 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.
2. In the event of an authorized control level event with respect to a health organization, the commissioner shall:
 - a. Take such actions as are required under section 26.1-03.2-04 regarding a health organization with respect to which a regulatory action level event has occurred; or
 - b. If the commissioner deems 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 chapter 26.1-06.1. If the commissioner takes such actions, the authorized control level event must be deemed sufficient grounds for the commissioner to

take action under chapter 26.1-06.1 and the commissioner shall have the rights, powers, and duties with respect to the health organization as are set forth in chapter 26.1-06.1. If the commissioner takes actions under this subdivision pursuant to an adjusted risk-based capital report, the health organization is entitled to such protections as are afforded to health organizations under the provisions of chapter 26.1-06.1 pertaining to summary proceedings.

26.1-03.2-06. Mandatory control level event.

1. "Mandatory control level event" means any of the following events:
 - a. The filing of a risk-based capital report that indicates that the health organization's total adjusted capital is less than its mandatory control level risk-based capital;
 - b. Notification by the commissioner to the health organization of an adjusted risk-based capital report that indicates the event in subdivision a, provided the health organization does not challenge the adjusted risk-based capital report under section 26.1-03.2-07; or
 - c. If, pursuant to section 26.1-03.2-07, the health organization challenges an adjusted risk-based capital report that indicates the event in subdivision a, notification by the commissioner to the health organization that the commissioner, after a hearing, has rejected the health organization's challenge.
2. In the event of a mandatory control level event, the commissioner shall take such actions as are necessary to place the health organization under regulatory control under chapter 26.1-06.1. In that event, the mandatory control level event must be deemed sufficient grounds for the commissioner to take action under chapter 26.1-06.1, and the commissioner shall have the rights, powers, and duties with respect to the health organization as are set forth in chapter 26.1-06.1. If the commissioner takes actions pursuant to an adjusted risk-based capital report, the health organization is entitled to the protections of chapter 26.1-06.1 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.

26.1-03.2-07. Hearings.

Upon the occurrence of any of the following events, the health organization shall have 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 1, 2, 3, or 4. Upon receipt of the health organization's request for a hearing, the commissioner shall set a date for the hearing, which may not be less than ten nor more than thirty days after the date of the health organization's request. The events include:

1. Notification to a health organization by the commissioner of an adjusted risk-based capital report;
2. Notification to a health organization by the commissioner that:
 - a. The health organization's risk-based capital plan or revised risk-based capital plan is unsatisfactory; and
 - b. Notification constitutes a regulatory action level event with respect to the health organization;
3. Notification to a health organization by the commissioner that the health organization has failed to adhere to its risk-based capital plan or revised risk-based capital 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 risk-based capital plan or revised risk-based capital plan; or
4. Notification to a health organization by the commissioner of a corrective order with respect to the health organization.

26.1-03.2-08. Confidentiality - Prohibition on announcements - Prohibition on use in ratemaking.

1. All risk-based capital reports, to the extent the information is not required to be set forth in a publicly available annual statement schedule, and risk-based capital plans, including the results or report of any examination or analysis of a health organization performed pursuant to this chapter, and any corrective order issued by the commissioner pursuant to examination or analysis, with respect to a domestic health organization or foreign health organization, which are filed with the commissioner constitute information that might be damaging to the health organization if made available to its competitors, and therefore shall be kept confidential by the commissioner. This information may not be made public 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 chapter or any other provision of the insurance laws of this state.
2. Neither the commissioner nor any person that received documents, materials, or other information while acting under the authority of the commissioner is permitted or required to testify in any private civil action concerning any confidential documents, materials, or information subject to subsection 1.
3. To assist in the performance of the commissioner's duties, the commissioner may:
 - a. Share documents, materials, or other information, including the confidential and privileged documents, materials, or information subject to subsection 1, with other state, federal, and international regulatory agencies; with the national association of insurance commissioners and its affiliates and subsidiaries; and with state, federal, and international law enforcement authorities, if the recipient agrees to maintain the confidentiality and privileged status of the document, material, or other information.
 - b. Receive documents, materials, or information, including otherwise confidential and privileged documents, materials, or information from the national association of insurance commissioners 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 documents, materials, or information is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or other information; and
 - c. Enter agreements governing sharing and use of information consistent with this subsection.
4. A waiver of an applicable privilege or claim of confidentiality in the documents, materials, or information does not occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in subdivision c of subsection 3.
5. It is the judgment of the legislature that the comparison of a health organization's total adjusted capital to any of its risk-based capital levels is a regulatory tool that 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 chapter, 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 risk-based capital levels of any health organization, or of any component derived in the calculation, by any health organization, insurance producer, or other person engaged in any manner in the insurance business would be misleading and is therefore prohibited. However, if any materially false statement with respect to the comparison regarding a health organization's total adjusted capital to its risk-based capital levels, or any of them, or an inappropriate comparison of any other

amount to the health organization's risk-based capital 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.

6. It is the further judgment of the legislature that the risk-based capital instructions, risk-based capital reports, adjusted risk-based capital reports, risk-based capital plans, and revised risk-based capital 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 may 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.

26.1-03.2-09. Supplemental provisions - Rules - Exemption.

1. The provisions of this chapter 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 chapter 26.1-06.1.
2. The commissioner may adopt reasonable rules necessary for the implementation of this chapter.
3. The commissioner may exempt from the application of this chapter a domestic health organization that:
 - a. Writes direct business only in this state;
 - b. Assumes no reinsurance in excess of five percent of direct premium written; and
 - c. Writes direct annual premiums for comprehensive medical business of less than an amount determined by the commissioner; or
 - d. Is a limited health service organization that covers less than a number of lives determined by the commissioner.

26.1-03.2-10. Foreign health organizations.

1.
 - a. A foreign health organization, upon the written request of the commissioner, shall submit to the commissioner a risk-based capital report for the calendar year just ended, the later of:
 - (1) The date a risk-based capital report would be required to be filed by a domestic health organization under this chapter; or
 - (2) Fifteen days after the request is received by the foreign health organization.
 - b. A foreign health organization, at the written request of the commissioner, shall promptly submit to the commissioner a copy of any risk-based capital plan that is filed with the insurance commissioner of any other state.
2. In the event of 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 risk-based capital statute applicable in the state of domicile of the health organization or, if no risk-based capital statute is in force in that state, under the provisions of this chapter, if the insurance commissioner of the state of domicile of the foreign health organization fails to require the foreign health organization to file a risk-based capital plan in the manner specified under that state's risk-based capital statute or, if no risk-based capital statute is in force in that state, under section 26.1-03.2-03, the commissioner may require the foreign health organization to file a risk-based capital plan with the commissioner. In such event, the failure of the foreign health organization to file a risk-based capital plan with the commissioner is grounds to order the health organization to cease and desist from writing new insurance business in this state.
3. In the event of a mandatory control level event with respect to a foreign health organization, if 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 district court permitted under section 26.1-06.1-04 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.

26.1-03.2-11. Immunity.

There is no liability on the part of, and no cause of action shall arise against, the commissioner or the insurance department or its employees or agents for any action taken by them in the performance of their powers and duties under this chapter.

26.1-03.2-12. Notices.

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

26.1-03.2-13. Phasein provision.

For risk-based capital reports required to be filed by health organizations with respect to 1999, the following requirements apply in lieu of the provisions of sections 26.1-03.2-03, 26.1-03.2-04, 26.1-03.2-05, and 26.1-03.2-06:

1. In the event of a company action level event with respect to a domestic health organization, the commissioner shall take no regulatory action under this chapter.
2. In the event of a regulatory action level event under subdivision a, b, or c of subsection 1 of section 26.1-03.2-04, the commissioner shall take the actions required under section 26.1-03.2-03.
3. In the event of a regulatory action level event under subdivision d, e, f, g, h, or i of subsection 1 of section 26.1-03.2-04 or an authorized control level event, the commissioner shall take the actions required under section 26.1-03.2-04 with respect to the health organization.
4. In the event of a mandatory control level event with respect to a health organization, the commissioner shall take the actions required under section 26.1-03.2-05 with respect to the health organization.