# Sixty-fourth Legislative Assembly of North Dakota
# In Regular Session Commencing Tuesday, January 6, 2015

SENATE BILL NO. 2129
(Industry, Business and Labor Committee)
(At the request of the Insurance Commissioner)

AN ACT to amend and reenact section 26.1-03.1-01, subsections 2 and 3 of section 26.1-03.1-02, section 26.1-03.1-03, subsection 2 of section 26.1-03.1-04, subdivision a of subsection 2 of section 26.1-03.1-06, and sections 26.1-03.1-07, 26.1-03.1-08, and 26.1-03.1-13 of the North Dakota Century Code, relating to risk-based capital reports of insurers.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 26.1-03.1-01 of the North Dakota Century Code is amended and reenacted as follows:

**26.1-03.1-01. Definitions.**

As used in this chapter:

1. "Adjusted risk-based capital report" means a risk-based capital report that has been adjusted by the commissioner in accordance with subsection ~~3~~5 of section 26.1-03.1-02.

2. "Corrective order" means an order issued by the commissioner specifying corrective actions that the commissioner has determined are required.

3. "Domestic insurer" means any ~~insurance company~~insurer domiciled in this state, except a county mutual insurance company.

4. "Foreign insurer" means any ~~insurance company~~insurer that is licensed to do business in this state under chapter 26.1-11 but is not domiciled in this state.

5. "Fraternal benefit society" means any insurer licensed under chapter 26.1-15.1.

6. "Life or health insurer" means any licensed life or health ~~insurance company~~insurer or a licensed property and casualty insurer writing only accident and health insurance.

~~6.~~7. "Negative trend" means, with respect to a life or health insurer or a fraternal benefit society, negative trend over a period of time, as determined in accordance with the trend test calculation included in the life or fraternal risk-based capital instructions.

~~7.~~8. "Property and casualty insurer" means any insurer licensed under chapter 26.1-05 or 26.1-11 but does not include monoline mortgage guaranty insurers, financial guaranty insurers, and title insurers.

9. "Risk-based capital instructions" means the risk-based capital report, including risk-based capital instructions adopted by the national association of insurance commissioners, as such 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.

~~8.~~10. "Risk-based capital level" means an insurer'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~~where:

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 insurer, the product of two and its authorized control level risk-based capital.

c. "Mandatory control level risk-based capital" means the product of seventy hundredths and the authorized control level risk-based capital.

d. "Regulatory action level risk-based capital" means the product of one and one-half and its authorized control level risk-based capital.

~~9.~~11. "Risk-based capital plan" means a comprehensive financial plan containing the elements specified in subsection 2 of section 26.1-03.1-03. If the commissioner rejects the risk-based capital plan, and it is revised by the insurer, with or without the commissioner's recommendation, the plan must be called the "revised risk-based capital plan".

~~10.~~12. "Risk-based capital report" means the report required in section 26.1-03.1-02.

~~11.~~13. "Total adjusted capital" means the sum of:

a. An insurer's statutory capital and surplus as determined in accordance with statutory accounting applicable to the annual financial statements required to be filed under section 26.1-03-07; and

b. Such other items, if any, as the risk-based capital instructions may provide.

**SECTION 2. AMENDMENT.** Subsections 2 and 3 of section 26.1-03.1-02 of the North Dakota Century Code are amended and reenacted as follows:

2. A life and health insurer's or fraternal benefit society's risk-based capital must be determined in accordance with the formula set forth in the risk-based capital instructions. The formula must take into account, and may adjust for the covariance between, the following factors determined in each case by applying the factors in the manner set forth in the risk-based capital instructions:

a. The risk with respect to the insurer's assets;

b. The risk of adverse insurance experience with respect to the insurer's liabilities and obligations;

c. The interest rate risk with respect to the insurer's business; and

d. All other business risks and any other relevant risks as are set forth in the risk-based capital instructions~~;~~

~~determined in each case by applying the factors in the manner set forth in the risk-based capital instructions~~.

3. A property and casualty insurer's risk-based capital must be determined in accordance with the formula set forth in the risk-based capital instructions. The formula must take into account, and may adjust for the covariance between, the following factors 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 any other relevant risks as are set forth in the risk-based instructions~~;~~

~~determined in each case by applying the factors in the manner set forth in the risk-based capital instructions~~.

**SECTION 3. AMENDMENT.** Section 26.1-03.1-03 of the North Dakota Century Code is amended and reenacted as follows:

**26.1-03.1-03. 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 an insurer which indicates that:

      (1) The insurer'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;

      (2) If a life or health insurer or a fraternal benefit society, the insurer 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 ~~two and one-half~~three and has a negative trend; or

      (3) If a property and casualty insurer, the insurer has total adjusted capital which 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 property and casualty risk-based capital instructions;

   b. The notification by the commissioner to the insurer of an adjusted risk-based capital report that indicates an event in subdivision a, provided the insurer does not challenge the adjusted risk-based capital report under section 26.1-03.1-07; or

   c. If, under section 26.1-03.1-07, an insurer challenges an adjusted risk-based capital report that indicates the event in subdivision a, the notification by the commissioner to the insurer that the commissioner, after a hearing, has rejected the insurer's challenge.

2. In the event of a company action level event, the insurer shall prepare and submit to the commissioner a risk-based capital plan that must:

   a. Identify the conditions that contribute to the company action level event;

   b. Contain proposals of corrective actions that the insurer intends to take and would be expected to result in the elimination of the company action level event;

   c. 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, ~~or~~and 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;

   d. Identify the key assumptions impacting the insurer's projections and the sensitivity of the projections to the assumptions; and

   e. Identify the quality of, and problems associated with, the insurer'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 insurer challenges an adjusted risk-based capital report under section 26.1-03.1-07, within forty-five days after notification to the insurer that, after a hearing, the commissioner has rejected the insurer's challenge.

4. Within sixty days after the submission by an insurer of a risk-based capital plan to the commissioner, the commissioner shall notify the insurer whether the risk-based capital plan may 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 insurer 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 insurer 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 insurer challenges the notification from the commissioner under section 26.1-03.1-07, within forty-five days after a notification to the insurer that, after a hearing, the commissioner has rejected the insurer's challenge.

5. In the event of a notification by the commissioner to an insurer that the insurer's risk-based capital plan or revised risk-based capital plan is unsatisfactory, ~~subject to the insurer's right to a hearing under section 26.1-03.1-07,~~ the commissioner may, subject to the insurer's right to a hearing under section 26.1-03.1-07, specify in the notification that the notification constitutes a regulatory action level event.

6. Every domestic insurer 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 insurer is authorized to do business if:

   a. The state has a risk-based capital provision substantially similar to subsection 1 of section 26.1-03.1-08; and

   b. 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 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.

**SECTION 4. AMENDMENT.** Subsection 2 of section 26.1-03.1-04 of the North Dakota Century Code is amended and reenacted as follows:

2. In the event of a regulatory action level event the commissioner shall:

   a. Require the insurer 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 insurer, including a review of its risk-based capital plan or revised risk-based capital plan~~, as the commissioner deems necessary~~; and

   c. Subsequent to the examination or analysis, issue an order specifying the corrective actions as the commissioner determines are required in a corrective order.

**SECTION 5. AMENDMENT.** Subdivision a of subsection 2 of section 26.1-03.1-06 of the North Dakota Century Code is amended and reenacted as follows:

a. With respect to a life insurer or fraternal benefit society, the commissioner shall take actions as are necessary to place the insurer 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 has the rights, powers, and duties in chapter 26.1-06.1 with respect to the insurer. If the commissioner takes action pursuant to an adjusted risk-based capital report, the insurer is entitled to the protection 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.

**SECTION 6. AMENDMENT.** Section 26.1-03.1-07 of the North Dakota Century Code is amended and reenacted as follows:

**26.1-03.1-07. Hearings.**

Upon~~:~~ any of the following, the insurer has the right to a confidential departmental hearing, on a record, at which the insurer may challenge any determination or action by the commissioner. The insurer shall notify the commissioner of the request for a hearing within five days after the notification by the commissioner under subsection 1, 2, 3, or 4. Upon receipt of the insurer's request for a hearing, the commissioner shall set a date for the hearing, which date may be no less than ten nor more than thirty days after the date of the insurer's request.

1. Notification to an insurer by the commissioner of an adjusted risk-based capital report;

2. Notification to an insurer by the commissioner that:

   a. The insurer's risk-based capital plan or revised risk-based capital plan is unsatisfactory; and

   b. Such notification constitutes a regulatory action level event with respect to the insurer;

3. Notification to any insurer by the commissioner that the insurer 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 insurer to eliminate the company action level event with respect to the insurer in accordance with its risk-based capital plan or revised risk-based capital plan; or

4. Notification to an insurer by the commissioner of a corrective order with respect to the insurer~~;~~

~~the insurer is entitled to a confidential departmental hearing, on a record, at which the insurer may challenge any determination or action by the commissioner. The insurer 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 insurer's request for a hearing, the commissioner must set a date for the hearing, which date must be no less than ten nor more than thirty days after the date of the insurer's request~~.

**SECTION 7. AMENDMENT.** Section 26.1-03.1-08 of the North Dakota Century Code is amended and reenacted as follows:

**26.1-03.1-08. Confidentiality - Prohibition on announcements - Prohibition on use in ratemaking.**

1. All risk-based capital reports, to the extent the information therein 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 an insurer performed under this chapter and any corrective order issued by the commissioner pursuant to examination or analysis, with respect to any domestic insurer or foreign insurer that are ~~filed with the commissioner constitute information that might be damaging to the insurer if made available to its competitors, and therefore must 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 under this chapter or any other provision of the insurance laws of this state~~in the possession or control of the insurance department are confidential and privileged, not subject to section 44-04-18, not subject to subpoena, and not subject to discovery and are not admissible in evidence in any private civil action. However, the commissioner may use any document, material, or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties.

2. Neither the commissioner nor any person that received any document, material, or other information while acting under the authority of the commissioner may be permitted or required to testify in any private civil action concerning any confidential document, material, or information subject to subsection 1.

3. To assist in the performance of the commissioner's duties, the commissioner:

   a. May share any document, material, or other information, including any confidential and privileged document, material, or information subject to subsection 1, with any other state, federal, or international regulatory agency; the national association of insurance commissioners and its affiliates and subsidiaries; and any state, federal, and international law enforcement authority, provided the recipient agrees to maintain the confidentiality and privileged status of the document, material, or other information.

   b. May receive any document, material, or information, including any otherwise confidential and privileged document, material, or information, from the national association of insurance commissioners and its affiliates and subsidiaries and from any regulatory and law enforcement official of any other foreign or domestic jurisdiction, 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.

   c. May enter any agreement governing sharing and use of information consistent with this subsection.

4. Waiver of any applicable privilege or claim of confidentiality in any document, material, 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 subsection 3.

~~2.~~5. It is the judgment of the legislative assembly that the comparison of an insurer's total adjusted capital to any of its risk-based capital levels is a regulatory tool that 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 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 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 risk-based capital levels of any insurer, or of any component derived in the calculation, by any insurer, insurance producer, broker, 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 an insurer's total adjusted capital to its risk-based capital levels, or any of them, or an inappropriate comparison of any other

amount to the insurer's risk-based capital levels is published in any written publication and the insurer 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 insurer may publish an announcement in a written publication if the sole purpose of the announcement is to rebut the materially false statement.

~~3.~~6. It is the further judgment of the legislative assembly 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 insurers and the need for possible corrective action with respect to insurers 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 an insurer or any affiliate is authorized to write.

**SECTION 8. AMENDMENT.** Section 26.1-03.1-13 of the North Dakota Century Code is amended and reenacted as follows:

**26.1-03.1-13. Phasein provision.**

1. For risk-based capital reports required to be filed by life insurers with respect to 1993, the following requirements apply in lieu of the provisions of sections 26.1-03.1-03, 26.1-03.1-04, 26.1-03.1-05, and 26.1-03.1-06:

   a. In the event of a company action level event with respect to a domestic insurer, the commissioner may take no regulatory action hereunder.

   b. In the event of a regulatory action level event under subdivision a, b, or c of subsection 1 of section 26.1-03.1-04, the commissioner shall take the actions required under section 26.1-03.1-03.

   c. In the event of a regulatory action level event under subdivision d, e, f, g, h, or i of subsection 1 of section 26.1-03.1-04 or an authorized control level event, the commissioner shall take the actions required under section 26.1-03.1-04 with respect to the insurer.

   d. In the event of a mandatory control level event with respect to an insurer, the commissioner shall take the actions required under section 26.1-03.1-05 with respect to the insurer.

2. For risk-based capital reports required to be filed by property and casualty insurers with respect to 1994, the following requirements apply in lieu of the provisions of sections 26.1-03.1-03, 26.1-03.1-04, 26.1-03.1-05, and 26.1-03.1-06:

   a. In the event of a company action level event with respect to a domestic insurer, the commissioner shall take no regulatory action hereunder.

   b. In the event of a regulatory action level event under subdivision a, b, or c of subsection 1 of section 26.1-03.1-04, the commissioner shall take the actions required under section 26.1-03.1-03.

   c. In the event of a regulatory action level event under subdivision d, e, f, g, h, or i of subsection 1 of section 26.1-03.1-04 or an authorized control level event, the commissioner shall take the action required under section ~~26.1-03.1-05~~26.1-03.1-04 with respect to the insurer.

d. In the event of a mandatory control level event with respect to an insurer, the commissioner shall take the actions required under section 26.1-03.1-05 with respect to the insurer.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-fourth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2129.

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| Senate Vote: | Yeas 47 | Nays 0 | Absent 0 |
| House Vote: | Yeas 86 | Nays 0 | Absent 8 |

Secretary of the Senate

Received by the Governor at 10:23 A.M. on March 26, 2015.

Approved at 1:59 P.M. on March 27, 2015.

Governor

Filed in this office this 27th day of March, 2015,

at 3:03 o'clock P. M.

Secretary of State