

ACT 80

H.B. NO. 1045

A Bill for an Act Relating to Insurance.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Section 431:3-401, Hawaii Revised Statutes, is amended as follows:

1. By adding three new definitions of “benefit society”, “domestic insurer”, and “health maintenance organization” to read:

““Benefit society” means a mutual benefit society registered under section 432:1-301 or a fraternal benefit society organized under section 432:2-301.

“Domestic insurer” includes an insurer, a benefit society or a health maintenance organization.

“Health maintenance organization” means a health maintenance organization authorized under section 432D-2.”

2. By amending the definition of “total adjusted capital” to read:

““Total adjusted capital” means the sum of:

- (1) An insurer’s statutory capital and surplus, or net worth, as determined in accordance with the statutory accounting applicable to the annual financial statements or reports required to be filed under section 431:3-301[;], 432:1-404, 432:2-602, or 432D-5; and
- (2) Any other items that the risk-based capital instructions may provide.”

SECTION 2. Section 431:3-402, Hawaii Revised Statutes, is amended to read as follows:

**“§431:3-402 Risk-based capital reports.** (a) Every domestic insurer, on or before each March 1 [(c), the “[filing date]”], 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 any information that is required by the risk-based capital instructions. In addition, every domestic insurer shall file its risk-based capital report:

- (1) With the National Association of Insurance Commissioners in accordance with the risk-based capital instructions; and
- (2) With the insurance commissioner in any state in which the insurer is authorized to do business, if the commissioner has notified the insurer of its request in writing, in which case the insurer shall file its risk-based capital report not later than the later of:
  - (A) Fifteen days from the receipt of notice to file its risk-based capital report with that state; or
  - (B) The filing date.

(b) A life or accident and health or sickness insurer’s risk-based capital shall be determined in accordance with the formula set forth in the risk-based capital instructions. The formula shall take into account and may adjust for the

covariance among the following, which shall be determined in each case by applying the factors in the manner set forth in the risk-based capital instructions:

- (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 that are set forth in the risk-based capital instructions.

(c) A property and casualty insurer's risk-based capital shall be determined in accordance with the formula set forth in the risk-based capital instructions. The formula shall take into account and may adjust for the covariance among the following, which shall be determined in each case by applying the factors in the manner set forth in the risk-based capital instructions:

- (1) Asset risk;
- (2) Credit risk;
- (3) Underwriting risk; and
- (4) All other business risks and ~~[such]~~ any other relevant risks as ~~[are]~~ set forth in the risk-based capital instructions.

(d) A benefit society or health maintenance organization's risk-based capital shall be determined in accordance with the formula set forth in the risk-based capital instructions. The formula shall take into account and may adjust for the covariance among the following, which shall be determined in each case by applying the factors in the manner set forth in the risk-based capital instructions:

- (1) Asset risk;
- (2) Credit risk;
- (3) Underwriting risk; and
- (4) All other business risks and any other relevant risks as set forth in the risk-based capital instructions.

~~[(d)]~~ (e) An excess of capital, or net worth, over the amount produced by the risk-based capital requirements contained in this part and the formulas, schedules, and instructions referenced in this part is desirable in the business of insurance. Accordingly, insurers shall seek to maintain capital above the risk-based capital levels required by this part. Additional capital is used and useful in the business of insurance and helps to secure an insurer 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 part.

~~[(e)]~~ (f) If a domestic insurer files a risk-based capital report which, 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 insurer of the adjustment. The notice shall contain a statement of the reason for the adjustment. A risk-based capital report ~~[as so]~~ adjusted pursuant to this subsection is referred to as an adjusted risk-based capital report."

SECTION 3. Section 431:3-403, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

- "(a) "Company action level event" means any of the following events:
- (1) The filing of a risk-based capital report by an insurer which indicates that:
    - (A) 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; ~~[or]~~

- (B) If a life or accident and health or sickness 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 ~~[2.5;]~~ two and a half, and has a negative trend;
  - (C) If a property and casualty insurer, the insurer has a total adjusted capital 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; or
  - (D) If a benefit society or health maintenance organization, the benefit society or health maintenance organization has a total adjusted capital 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;
- (2) The notification by the commissioner to the insurer of an adjusted risk-based capital report that indicates the occurrence of the event in paragraph (1), if the insurer does not challenge the adjusted risk-based capital report under section 431:3-407; or
  - (3) If, pursuant to section 431:3-407, the insurer challenges an adjusted risk-based capital report that indicates the occurrence of the event in paragraph (1), the notification by the commissioner to the insurer that the commissioner has, after a hearing, rejected the insurer's challenge."

SECTION 4. Section 431:3-406, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

- "(b) In the event of a mandatory control level event:
- (1) With respect to a life or accident and health or sickness insurer, the commissioner shall take any actions that are necessary to cause the insurer to be placed under regulatory control under article 15. In that event, the mandatory control level event shall be deemed sufficient grounds for the commissioner to take action under article 15, and the commissioner shall have the rights, powers, and duties with respect to the insurer as ~~[are set forth in]~~ provided by article 15. In the event the commissioner takes actions pursuant to an adjusted risk-based capital report, the insurer shall be entitled to the protections ~~[that are]~~ afforded to insurers under section 431:15-201. Notwithstanding [any of the foregoing,] the requirements of this paragraph, 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; ~~[or]~~
  - (2) With respect to a property and casualty insurer, the commissioner shall take any actions that are necessary to cause the insurer to be placed under regulatory control under article 15, or, in the case of an insurer that is writing no business and 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 deemed sufficient grounds for the com-

missioner to take action under article 15<sup>[.]</sup> and the commissioner shall have the rights, powers, and duties with respect to the insurer as are set forth in article 15. In the event the commissioner takes actions pursuant to an adjusted risk-based capital report, the insurer shall be entitled to the protections ~~[that are]~~ afforded to insurers under section 431:15-201. Notwithstanding ~~[any of the foregoing,]~~ the requirements of this paragraph, 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~~[-]; or~~

- (3) With respect to a benefit society or health maintenance organization, the commissioner shall take any actions that are necessary to cause the insurer to be placed under regulatory control under article 15. In that event, the mandatory control level event shall be deemed sufficient grounds for the commissioner to take action under article 15, and the commissioner shall have the rights, powers, and duties with respect to the insurer as are set forth in article 15. In the event the commissioner takes actions pursuant to an adjusted risk-based capital report, the insurer shall be entitled to the protections that are afforded to insurers under section 431:15-201. Notwithstanding the requirements of this paragraph, 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 5. Section 431:3-408, Hawaii Revised Statutes, is amended to read as follows:

**"§431:3-408 Confidentiality and prohibition on announcements; prohibition on use in ratemaking.** (a) All risk-based capital reports~~[,]~~ to the extent the information ~~[therein]~~ contained in the report 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 pursuant to this part 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]~~ that are in the possession or under the control of 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]~~ law and shall be privileged. Risk-based capital reports and risk-based capital plans subject to this section shall not be made public ~~[or,]~~ shall not be subject to subpoena~~[-, other than by the commissioner and then only to enforce actions taken by the commissioner pursuant to this part or any other provision of the insurance laws of this State.]~~ or discovery, and shall not be admissible as evidence in any private civil action; provided that:

- (1) This section shall not be construed to limit the commissioner's authority to use the documents, materials, or other information in furtherance of any regulatory or legal action brought as part of the commissioner's official duties; and
- (2) Neither the commissioner nor any person who received documents, materials, or other information while acting under the authority of the commissioner shall be permitted or required to testify in any pri-

vate civil action concerning any confidential documents, materials, or information subject to this subsection.

(b) The commissioner may share documents, materials, or other information, including confidential and privileged documents, materials, or information subject to subsection (a), 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; provided that the recipient agrees to maintain the confidential and privileged status of the document, material, or other information and has the legal authority to do so.

(c) The commissioner may 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. The commissioner shall maintain as confidential or privileged, pursuant to subsection (a)(2), 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.

(d) The commissioner may enter into agreements governing sharing and use of information consistent with subsections (b) and (c).

(e) No waiver of any applicable privilege or claim of confidentiality in the documents, materials, or information subject to this section shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in subsections (b) and (c).

~~[(b)]~~ (f) The comparison of an insurer's total adjusted capital to any of its risk-based capital 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] Except as otherwise required under this part, [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, producer, or other person engaged in any manner in the insurance business [would be] is misleading and is [therefore] prohibited[; provided that if]. If any materially false statement with respect to the comparison [regarding] of an insurer's total adjusted capital to any or all of its risk-based capital levels [(or any of them)] or [an] any 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 or inappropriateness of the statement[; or the inappropriateness, as the case may be,] then the insurer may publish an announcement in a written publication [if] for the sole purpose of [the announcement is to rebut] rebutting the materially false or inappropriate statement.

~~[(e) The risk-based]~~ (g) 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 shall not be used by the commissioner for ratemaking, [nor] considered or introduced as evidence in any rate proceeding, [nor] or

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."

SECTION 6. Section 431:3-409, Hawaii Revised Statutes, is amended to read as follows:

**"§431:3-409 Supplemental provisions; rules; exceptions.** (a) This part is supplemental to any other laws of this State, and shall not preclude or limit any other powers or duties of the commissioner under those laws, including[;] but not limited to article 15.

(b) The commissioner may adopt rules pursuant to chapter 91 necessary for the implementation of this part.

(c) The commissioner may exempt from the application of this part any domestic property and casualty insurer ~~[which:]~~ that:

- (1) Writes direct business in this State;
- (2) Writes direct annual premiums of \$2,000,000 or less; and
- (3) Assumes no reinsurance in excess of five per cent of direct premiums written.

(d) The commissioner may exempt from the application of this part any domestic benefit society or health maintenance organization that:

- (1) Writes direct business only in this State;
- (2) Assumes no reinsurance in excess of five per cent of direct premiums written; and
- (3) Writes direct annual premiums for comprehensive medical business of \$2,000,000 or less; or
- (4) Is a benefit society or health maintenance organization that covers fewer than two-thousand lives."

SECTION 7. Section 432:1-102, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) Article 2, article 2D, part IV of article 3, article 13, [and] article 14G, and article 15 of chapter 431, and the powers [there] granted by those provisions to the commissioner, shall apply to managed care plans, health maintenance organizations, or medical indemnity or hospital service associations[; which] that are owned or controlled by mutual benefit societies[;] so long as the application in any particular case is in compliance with and is not preempted by applicable federal statutes and regulations."

SECTION 8. Section 432:2-102, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) Nothing in this article shall exempt fraternal benefit societies from the provisions and requirements of part IV of article 2, part IV of article 3, and article 15 of chapter 431 and of section 431:2-215."

SECTION 9. Section 432D-19, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

"(d) Article 2, article 2D, part IV of article 3, article 13, [and] article 14G, and article 15 of chapter 431, and the [power there] powers granted by those provisions to the commissioner[;] shall apply to health maintenance organizations, so long as the application in any particular case is in compliance with and is not preempted by applicable federal statutes and regulations."

**SECTION 10.** Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

**SECTION 11.** This Act shall take effect on July 1, 2011.

(Approved June 1, 2011.)