

Readopt with amendment Ins 1700, effective 01-30-09 (Doc. #9373), to read as follows:

CHAPTER Ins 1700 NEW HAMPSHIRE MEDICAL MALPRACTICE JOINT UNDERWRITING PLAN

Statutory Authority: RSA 400-A:15; RSA 404-C

PART Ins 1701 PURPOSE AND AUTHORITY

Ins 1701.01 Purpose.

(a) These rules provide for the continued operation and maintenance of the plan established after a hearing on August 4, 1975, and a determination in accordance with RSA 404-C, that adequate medical malpractice liability insurance was not readily available in the voluntary market and the public interest required such availability.

(b) Pursuant to RSA 404-C, if the public interest requires the availability of insurance, the commissioner is authorized to establish, operate and maintain a plan to provide such coverage.

In accordance with RSA 404-C, the plan has been established and operates exclusively for the public purpose of ensuring the availability of adequate medical malpractice liability insurance to health care providers in this state where such liability insurance is not readily available in the voluntary market, consistent with the public interest in such availability. It is the intent of this chapter that, by ensuring access to adequate medical malpractice insurance for all eligible health care providers, the plan will promote the public interest by ensuring that consumers of health care services have adequate access to needed care.

(c) Notwithstanding any amendment of these rules governing the establishment, maintenance and operation of the plan, the plan has been established and continues to be maintained and operated, as a single continuing program under the direction, authority and supervision of the commissioner for the purpose state. Absent a determination of a court of competent jurisdiction to the contrary, if any provision of this chapter or the application thereof to any person or circumstance is held invalid, the plan is intended to continue to operate as a single continuing plan, and it is the intent of these rules that any invalid provision shall not affect the continued operation of the plan or validity of other provisions of this chapter which can be given effect independently of the invalid provision or invalid application of any provision.

Ins 1701.02 Scope. The plan has been established, and shall operate and be maintained pursuant to RSA 404-C and these rules, as an integral part of the State of New Hampshire under the direction, authority and supervision of the commissioner. The plan shall operate in accordance with the provisions of this chapter and except as provided herein, the plan shall not be regulated or licensed as an insurance company pursuant to the provisions of Title XXXVII. In accordance with RSA 400-A:15, I., the commissioner has full power and authority to amend or rescind any provision of the plan.

[Ins 1701.02 Establishment of Plan. The plan has been established, and shall operate and be maintained pursuant to RSA 404-C and these rules, as an integral part of the State of New Hampshire under the direction, authority and supervision of the commissioner. The plan shall operate in accordance with the provisions of this chapter and except as provided herein, the plan shall not be regulated or licensed as an insurance company pursuant to the provisions of Title XXXVII. In accordance with RSA 400-A:15, I the commissioner has full power and authority to amend or rescind any provision of the plan.

Ins 1701.03 Authority. These rules are for the continued operation and maintenance of the plan established after a hearing and a determination in accordance with RSA 404-C, that adequate medical malpractice liability insurance was not readily available in the voluntary market and the public interest required such availability. Pursuant to RSA 404-C, if the public interest requires the

availability of insurance, the commissioner is authorized to establish, operate and maintain a plan to provide such coverage.

Ins 1701.04 History. Notwithstanding any amendment of these rules governing the establishment, maintenance and operation of the plan, the plan has been established, and continues to be maintained and operated, as a single continuing program under the direction, authority and supervision of the commissioner for the purpose stated in Ins 1701.01.

Ins 1701.05 Severability. The provisions of this chapter shall be severable and if any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or application of the chapter which can be given effect without the invalid provisions or applications.]

PART Ins 1702 DEFINITIONS

Ins 1702.01 Applicability. The definitions set forth in this part shall apply for all purposes of this chapter.

Ins 1702.02 Definitions.

(a) "Board" means the board of directors of the plan.

(b) "Commissioner" means the insurance commissioner of the state of New Hampshire.

(c) "Eligible risk" means any health care provider operating legally in the state of New Hampshire excluding such person if timely payment of premium is not tendered or if there is an unsatisfied judgment of record against such person for recovery of amounts due for medical malpractice insurance premiums and such person has not been discharged from paying such judgment, or if such person does not furnish the information necessary to effect insurance coverage.

(d) "General assets" means "general assets" as defined in RSA 402-C:3.

(e) "Health care provider" means:

(1) In the case of a natural person, a person licensed, registered, certified or approved by the state to provide health care or professional services, including but not limited to, as a:

- a. Physician;
- b. Surgeon;
- c. Osteopath;
- d. Podiatrist;
- e. Chiropractor;
- f. Dentist;
- g. Dental hygienist;
- h. Registered pharmacist;
- i. Registered professional nurse;
- j. Licensed practical nurse;

k. Advanced registered nurse practitioner;**[k.] l.** Advanced registered optometrist;**[l.] m.** Physical therapist;**[m.] n.** Physiotherapist;**[n.] o.** Physician's assistant;**[o.] p.** Paramedic; or**[p.] q.** Psychologist;

(2) In the case of an institution:

a. Hospital;

b. Nursing home;

c. Health maintenance organization;

d. Ambulance or other corporation;

e. Facility or entity licensed by the state to provide health care services; or

f. An officer, employee or agent of any such person or institution acting in the course and scope of his employment; and

(3) Where the context so permits, both persons and institutions as listed in (1) and (2) above.

(f) "Liability insurance" means insurance issued pursuant to RSA 401:1, I, II, V, VI, VII and VIII.

(g) "Medical malpractice insurance" means insurance coverage against the legal liability of the insured and against loss, damage, or expense incident to a claim arising out of the death or injury of any person as a result of negligence in professional services rendered or which should have been rendered by any health care provider operating legally in the state. It does not include excess liability insurance that would serve to increase the limits of coverage over the maximum provided for in the plan.

(h) "NAIC" means the National Association of Insurance Commissioner, an organization of insurance regulators from the 50 states, the district of Columbia and U.S. territories which provides a forum for the development of uniform regulatory policy through the input of regulators, legislators, industry representatives and consumers.

[(h)] (i) "Net direct premiums" means gross direct premiums written in this state on liability insurance, including the liability component of multiple peril package policies, which shall be 25 percent of the total multi-peril package policy premium, as well as the liability component of homeowners policies which shall be 10 percent of the homeowners policy premium, in each case less return premiums and dividends paid or credited to policyholders thereon.

[(i)] (j) "Person" means any natural person, firm, co-partnership, association, corporation, government or agency thereof.

[(j)] (k) "Plan" means the New Hampshire medical malpractice joint underwriting plan, established by the commissioner in 1976 as the New Hampshire medical malpractice joint underwriting association, pursuant to RSA 404-C and operated in accordance with this chapter.

[(k)] (l) "Policyholder" means an individual or entity that is insured under a policy of insurance issued in New Hampshire.

[(l)] (m) "Primary medical liability coverage" means policy limits of liability up to and including:

- (1) \$ 1,000,000 for each claimant; and
- (2) \$3,000,000 for all claims in any policy year.

[(m)] (n) "Producer" means a person required to be licensed pursuant to RSA 402-J to sell, solicit, or negotiate insurance.

[(n)] (o) "Required participant" means an insurer that is required to participate in the plan pursuant to Ins 1705.01.

(p) "Stabilization reserve fund" means the account established by amendment to Ins 1700 effective December 20, 1985 to receive and hold the stabilization reserve fund surcharge and to pay all losses, all loss adjustment expenses and all operating expenses incurred with respect to the SRF policies.

[(o)] (q) "Stabilization reserve fund surcharge" means the **[annual]** stabilization reserve fund charge **that was** imposed by order **of the commissioner, [on] after** hearing, upon each policy of medical malpractice insurance issued by the plan or by the voluntary market **[, on or after] between** January 1, 1986 and **[until]** December 31, 1993, which surcharge was applied to each policy at an amount equal to:

- (1) 15% of the annual gross premium charged for primary medical liability coverage for policies issued from January 1, 1986 through December 31, 1992; and
- (2) 7.5% of the annual gross premium charged for primary medical liability coverage for policies issued from January 1, 1993 through December 1993.

[(p)] (r) "SRF policies" means those policies of medical malpractice insurance issued by the plan prior to January 1, 1986.

PART Ins 1703 GOVERNANCE OF THE PLAN

Ins 1703.01 Governance of the Plan. The rules of this part shall govern the proceedings and acts of the plan.

Ins 1703.02 Board of Directors.

(a) The activities and affairs of the plan shall be managed by a board of directors established in accordance with this part, subject to the direction, supervision and oversight of the commissioner.

(b) The board of directors shall have 8 members, comprised of the commissioner or the commissioner's insurance department staff designee, who shall serve as an ex officio, non-voting member, and 7 voting members, each of whom shall be appointed by the commissioner.

(c) Each of the 7 voting members shall hold office for a term of 3 years and until a successor is appointed or the member's earlier resignation or removal.

(d) The 7 voting members shall have the following affiliations:

(1) Two persons employed by one or more required participants, one of whom shall be a member of the New Hampshire Association of Domestic Insurance Companies;

(2) Three persons who are health care providers as follows:

a. One of whom shall be a member of the New Hampshire Medical Society;

b. One of whom shall be a member of the New Hampshire Hospital Association;
and

c. One of whom shall not be a member of either the New Hampshire Medical Society or the New Hampshire Hospital Association; and

(3) Two who shall not be members of nor have any affiliations with any of the preceding groups described in (d)(1) and (2).

(e) The commissioner shall consider nominations of persons for appointment to the board of directors as follows:

(1) One nomination for a person described in(d)(1) from the New Hampshire Association of Domestic Insurance Companies;

(2) One nomination described in (d)(2) for a health care provider from the New Hampshire Medical Society; and

(3) One nomination for a health care provider described in (d)(2) from the New Hampshire Hospital Association.

(f) Any director shall resign by giving notice to the commissioner. Such resignation shall take effect at the time specified in the notice, or, if no time is specified, at the time of acceptance of the resignation as determined by the commissioner.

(g) If the office of a director shall become vacant, the commissioner shall appoint a replacement to serve the remainder of the term of the vacant office.

(h) The commissioner may remove any director **[with or without] for** cause. **Cause for removal exists when:**

(1) The board member fails to attend more than 2 quarterly meetings in any given 12 month period;

(2) The board member engages in any wanton or reckless act that would disqualify the member from indemnification under RSA 99-D;

(3) The board member commits a breach of duty involving bad faith, dishonesty, willful misfeasance or reckless disregard for the responsibilities of office that would disqualify the member from indemnification under the provisions of Ins 1704.11(b);

(4) The board member is indicted for any crime involving dishonesty or breach of trust;

(5) The board member is unable because of illness, injury or other incapacity, to perform the duties as a member of the board; or

(6) Any other circumstances that exist that would make the board member unqualified to serve such that removal would be in the best interests of the plan.

Ins 1703.03 Meetings of the Board.

(a) The annual meeting of the board shall be held in November of each year. At the annual meeting, the board shall elect officers, and transact any other business properly before such meeting.

(b) In addition to the annual meeting, the board shall hold regular meetings at such times and places as the board shall determine. In addition to the annual meeting, the board shall hold no fewer than 3 regular meetings during any fiscal year.

(c) Special meetings of the board shall be held upon call of the commissioner or petition of 3 members of the board of directors.

(d) All meetings and proceedings of the board shall be open to the public, and shall be conducted in a manner that complies with the requirements of RSA 91-A.

(e) Notice of the time, day and place of any meeting of the board shall be given at least 10 calendar days prior to the meeting to each director personally or by telephone, or by mail at his or her address as it appears on the records of the plan. Notice of the time, day and place of any meeting shall be waived in writing or by attendance without objection at such meeting. The purpose for which a special meeting is called shall be stated in the notice.

(f) Subject to the requirements of RSA 91-A, notice of the time, day and place of any meeting of the board shall be posted in 2 appropriate places or shall be printed in a newspaper of general circulation in the city or town where the meeting is to be held at least 24 hours, excluding Sundays and legal holidays, prior to such meeting.

(g) A majority of the directors then in office shall constitute a quorum for the transaction of any business.

(h) The act of a majority of the directors at a meeting at which a quorum is present at the time of the act shall be the act of the board. Each director, except the commissioner, shall have one vote on all matters. Directors shall not vote by proxy.

Ins 1703.04 Officers.

(a) The officers of the plan shall be a chairperson, vice chairperson, treasurer and secretary. At each annual meeting the board shall elect from among the members of the board of directors a chairperson, vice chairperson, **treasurer** and secretary, each of whom shall hold office until the next annual election of officers and until his or her successor shall have been elected. If any officer shall cease serving as a member of the board for any reason, then such officer shall also cease to hold the office to which he or she had been elected. Any vacancy occurring in any office shall be filled by action of the board at any meeting of the board.

(b) The chairperson shall preside at all meetings of the board. The vice chairperson shall act as chairperson in the absence of the chairperson and, when so acting, shall have the power and authority of the chairperson. The secretary shall ensure that all notices of plan meetings are duly given in accordance with RSA 91-A and this chapter.

PART Ins 1704 OPERATION OF THE PLAN

Ins 1704.01 Powers of the Board.

(a) The board shall have the power and authority, subject to the commissioner's direction, supervision and approval, to exercise all reasonable or necessary powers relating to the operation of the plan, including but not limited to:

(1) Payment of all claims and expenses of the plan without appropriation under RSA 9 and without qualifying as a department expenditure under RSA 4:15, either directly or through the servicing organization(s);

(2) Investment and management of the assets of the plan either directly or through the servicing organization(s), an investment management firm, or other third party in accordance with this chapter;

(3) Retention of one or more servicing organizations, in accordance with Ins 1704.02(a), as are reasonable and appropriate to carry out the operations of the plan;

(4) Retention, hiring and payment of:

a. Such employees and staff of the plan as are reasonable and appropriate to carry out the operations of the plan;

b. Legal counsel to act on behalf of the plan in all matters related to the plan's servicing and payment of claims; provided however, that the plan and the board shall otherwise be represented exclusively by the attorney general in accordance with RSA 7; and

c. Actuaries, certified public accountants or other professionals required to carry out the operations of the plan.

(5) Negotiation of and entering into reinsurance agreements, with approval of the commissioner, as are reasonable and appropriate to carry out the operations of the plan, **including the stabilization reserve fund**; and

(6) All other powers necessary and appropriate to carry out the operations of the plan[, **subject to the commissioner's direction, supervision and approval**].

(b) The commissioner shall act in the public interest to direct, supervise and approve the actions of the board and to grant the board all powers necessary and appropriate to carry out the operation of the plan in accordance with the guidelines set forth in RSA 404-C and to ensure:

(1) The efficient and prudent financial operation of the plan in accordance with this chapter for its stated purpose;

(2) The financial solvency of the plan;

(3) Payment of claims pursuant to policy provisions established in accordance with this chapter; and

(4) The prudent investment of the assets of the plan in accordance with Ins 1704.08(d).

Ins 1704.02 Servicing Organization(s).

(a) The plan shall conduct its operations by retaining one or more servicing organizations to carry out the day-to-day operations of the plan. The plan shall retain a servicing organization(s) upon recommendation of the board and approval of the commissioner. The retention of a servicing

organization(s) shall be pursuant to a written contract, which shall be approved and executed by the commissioner.

(b) Subject to the provisions of this chapter, the commissioner shall appoint one or more required participants to be servicing organizations or shall appoint a person that does not operate as an insurance company to act as a servicing organization(s).

(c) The servicing organization(s) shall be authorized to bind coverage and issue policies on behalf of the plan and do those things necessary and incidental thereto, including the collection and transmission of premium to the plan and payment of commissions to producers and shall meet the following requirements:

(1) The servicing organization(s) shall have the capability to properly process and service, and shall agree to service, all eligible risks insured by the plan at a level equal to that rendered in the voluntary market, including but not limited to, loss prevention assistance and reasonable premium payment plans;

(2) The servicing organization(s) shall agree to perform those duties necessary or incidental to the fulfillment of its obligations hereunder, at the direction, supervision and approval of the commissioner, as set forth in this chapter and as shall be set out in a contract between the commissioner and the servicing organization(s), including, but not limited to:

- a. Binding coverage;
- b. Issuing policies;
- c. Collecting premium;
- d. Processing subsequent policy transactions;
- e. Performing necessary and reasonable loss prevention services;
- f. Servicing claims on a timely basis;
- g. Carrying out all necessary accounting procedures;
- h. Collecting necessary or required data;
- i. Generating necessary or required statistical and accounting information in the report format required;
- j. Calculating and collecting assessments upon required participants imposed by the plan as provided in Part Ins 1706;
- k. Investing premiums paid for coverage under the plan;
- l. Assisting with the development and preparation of the annual financial statement of the plan;
- m. Establishing one or more bank accounts upon which the servicing organization(s) shall be empowered to draw to pay claims and related expenses; and
- n. Establishing and maintaining fidelity bond coverage.

(d) Nothing shall preclude the designation of more than one servicing organization(s) to service specified kinds of health care providers who are eligible risks, provided that the commissioner shall appoint sufficient servicing organizations to service all kinds of health care providers who are eligible risks.

(e) The commissioner shall act in the public interest to appoint and contract with a servicing carrier(s) in accordance with the guidelines set forth in RSA 404-C and to ensure:

(1) The efficient and prudent financial operation of the plan in accordance with this chapter for its stated purpose;

(2) The financial solvency of the plan;

(3) Payment of claims pursuant to policy provisions established in accordance with this chapter; and

(4) The prudent investment of the assets of the plan in accordance with Ins 1704.08(d).

Ins 1704.03 Servicing Organization(s) Allowance.

(a) Servicing organizations shall pay losses, receive reimbursement for expenses, and pay commissions on the following basis:

(1) The servicing organization(s) shall pay losses from the plan's account as provided in Ins 1704.02(c)(2)(m);

(2) The servicing organization(s) shall receive payment for work performed and shall be reimbursed for the expenses of plan business in accordance with a written contract entered into with the commissioner. This contract shall include provisions related to compensation and reimbursement to the servicing organization(s), including:

a. Reimbursement of expenses incurred in qualifying for, or ceasing to be, a servicing organization(s); and

b. Reimbursement for normal insurance business losses incurred in connection with plan business. Such normal business losses shall include any losses or reasonable expenses paid or incurred which are not otherwise reimbursed under (a)(1) or (a)(2)a. above, which are in excess of the allowances provided thereunder, or which would reduce the service fee allowed. However, such losses shall not include any loss or expense incurred as a result of fraud or dishonesty on the part of any personnel of a servicing organization(s), including but not limited to independent adjusters, or on the part of others with whom the servicing organization(s) has entered into contracts for the performance of all or part of the duties required of servicing organizations.

(3) The servicing organization(s) shall pay commission of 7½ percent from the plan's account as provided in Ins 1704.02 (c)(2)m. to the producer on new and renewal business written through the plan.

(b) Compensation payable to or losses or expenses reimbursable to the servicing organization(s) for which sufficient funds are not otherwise available shall be obtained by the plan through an assessment against the required participants in the plan.

(c) The servicing organization(s) shall request payment or reimbursement as set forth in (a)(2)a. and b. above, by providing an accounting to the board of all work performed and losses or expenses incurred.

Ins 1704.04 Licensed Producers. All producers licensed for liability insurance in the state of New Hampshire shall be authorized to procure medical malpractice insurance for eligible risks from the plan. As a condition of the authority to continue acting as a producer, no such producer shall refuse to procure such

insurance for an eligible risk. No insurer shall penalize any of its producers, either directly or indirectly, for procuring such insurance for eligible risks.

Ins 1704.05 Coverage, Rates and Forms.

(a) The plan shall issue or cause to be issued a **non-assessable and non-participating** policy of medical malpractice insurance to any eligible risk, utilizing the rates, rating plans, policy forms, rules and classification systems established by the plan at the direction, supervision and approval of the commissioner in accordance with RSA 404-C, RSA 412 and this chapter.

(b) Coverage shall be provided on an occurrence or claims-made basis under such policies and forms and subject to such rates, rating plans and classification systems as **determined by the board to [approved by the commissioner, and shall]** be at the same level as is provided in the voluntary market. **Such policies, forms, rates, rating plans and classification systems shall be approved by the commissioner. Upon imposition of an assessment pursuant to Ins 1706.03 or Ins 1706.04, the board shall act to ensure that plan rates are adjusted as needed to be at the same level as provided in the voluntary market.**

(c) Coverage shall be provided for medical malpractice claims reported after the inception of coverage of the eligible risk by the plan which were incurred while the eligible risk was covered under a prior claims-made policy, but for which period the prior claims-made policy does not provide coverage or offer the option to purchase coverage. There shall be no such coverage however for such periods as to which the prior liability carrier had offered the option to purchase the coverage. Such coverage by the plan shall be at the same level and limits otherwise provided under this chapter.

(d) Coverage for an eligible risk shall become effective at 12:01 A.M. on the day following the day the eligible risk applies for coverage, unless the eligible risk requests a later effective date, provided that timely payment of the appropriate premium is made. The date of application shall be the date the eligible risk signs the application or the date on which the producer notifies the plan, whichever is sooner, provided that no producer shall delay the signing of the application or the notification to the plan so as to avoid the timely binding of coverage. Coverage shall remain in effect for one year, unless the eligible risk cancels or unless premium is not paid when due.

(e) Coverage shall be provided at such limits and for such forms of medical malpractice insurance, as the eligible risk shall select. Such insurance shall be subject to minimum limits of \$25,000 for each claimant and \$75,000 for all claimants in any one policy year, and subject to maximum limits of \$1,000,000 for each claimant and \$3,000,000 for all claimants in any one policy year.

(f) Coverage shall be provided at such limits and for such forms of general liability insurance, as the eligible risk shall select. Such insurance shall be subject to minimum limits of \$25,000 for each claimant and \$75,000 for all claimants in any one policy year, and subject to maximum limits of \$1,000,000 for each claimant and \$3,000,000 for all claimants in any one policy year. With respect to coverage that provides for a separate limit for the liability of the insured for damage to property, such limit shall be subject to a minimum of \$25,000 per occurrence and to a maximum of \$100,000 per occurrence.

(g) Policies shall be renewed annually at the option of the eligible risk and such coverage shall be cancelable by the plan only on the grounds of nonpayment of premium or other charges.

Ins 1704.06 Prohibition on Private Inurement.

(a) No part of the net earnings or assets of the plan shall inure to the benefit of or be distributable to any required participant, policyholder, director or officer or any other private individual, except that the plan is authorized and empowered to pay:

- (1) Claims and expenses with respect to policies issued by the plan

(2) Reasonable compensation for services rendered in accordance with this chapter; and

(3) Any other expense or payment, in accordance with this chapter and in furtherance of the purposes of the plan, including without limitation the costs and expenses of indemnification under Ins 1704.11(b).

Ins 1704.07 Records and Reports.

(a) The **commissioner shall determine in accordance with RSA 91-A, what** books of account, records, reports, and other documents of the plan shall **[generally]** be open to **public** inspection **[in accordance with RSA 91-A, except that the commissioner shall determine the extent to which exemptions from disclosure under RSA 91-A apply]** and shall instruct the board and the servicing organization(s) accordingly.

(b) The servicing organization(s) shall make detailed reports of liability assumed or cancelled by the plan, prepare annual budgets of the plan and provide an accounting to the commissioner, to the board and to each required participant at least every 12 months.

(c) The servicing organization(s) shall submit quarterly reports to the commissioner and the board of liabilities assumed or cancelled by the plan and any other subjects requested by the commissioner or the board.

(d) The commissioner shall cause the books of account of the plan to be audited at least every 12 months by a firm of independent public accountants.

(e) The commissioner shall review the plan's operations to determine the plan's compliance with this chapter, using the procedures, requirements and protections set forth in RSA 400-A:37, as if the plan were an insurance company.

(f) The commissioner shall cause the books of account of the servicing organization(s) to be audited by a firm of independent auditors as required to ascertain compliance with this chapter.

Ins 1704.08 Capital, Reserves, Investments and Excess Assets.

(a) All premiums, assessments and stabilization reserve fund surcharges collected by the plan shall be held in the name of the plan and invested by the servicing organization(s) in accordance with this chapter.

(b) The **board shall establish and the commissioner shall approve, taking into account any ceded or assumed reinsurance [with advice of the board, shall have the exclusive authority to determine, using accepted actuarial methodologies and standards of practice,]** the level of capital and reserves required to pay all known or reasonably ascertainable losses, including an adequate provision for incurred but not reported losses, all known or reasonably ascertainable loss adjustment expenses and all known or reasonably ascertainable operating expenses, as well as to maintain an adequate surplus with respect to policies issued on or after January 1, 1986. **The commissioner shall appoint an independent actuarial firm to review and support the determination of capital and reserves by the board. The level of capital and reserves established by the board and approved by the commissioner in accordance with this paragraph shall not be below a level equivalent to 300 percent of the risk based capital requirement for property and casualty insurers determined in accordance with the formula and standards set forth by the NAIC in RBC instructions defined at RSA 404-F:1, IX. The board's determination of capital and reserves and the approval of the board's decision shall be based upon accepted actuarial methodologies and standards of practice and analytical tools and measurements of risk including:**

(1) Underwriting risk, including consideration of possible fluctuations in the plan's market share;

(2) Reserving policy;

(3) Balance sheet contingencies;

(4) Investment risk;

(5) Financial risk;

(6) General business risk;

(7) Credit risk or reinsurance risk;

(8) Changes in the political and social environment; and

(9) Any other risk or consideration that impacts capital adequacy.

(c) In the event the capital and reserves fall below the level set forth in paragraph (b), the board shall prepare and submit to the commissioner for approval, a corrective action plan to address any deficiency which shall:

(1) Identify the quality and nature of plan business including anticipated business growth and the impact of growth on capital and reserves, risk exposure including extraordinary risk exposure, use of reinsurance, quality of assets, and other conditions which impact capital and reserves;

(2) Contain corrective action proposals and projections as to how the corrective action proposed will bring capital and reserves to the levels required in paragraph (b); and

(3) Identify the key assumptions that impact the projections described in (c)(2) and the sensitivity of these projections to those assumptions.

[(c)] (d) Assets held by the plan to support the required capital and reserves established in (b) above, as well as all premiums collected by the plan, assessments and stabilization reserve fund surcharges shall be maintained and invested by the board, through the servicing organization(s), an investment management firm, or other third party as follows:

(1) The liquid reserves portion of the plan's investment portfolio shall consist of commercial paper, bankers' acceptances, certificates of deposit, and U.S. Treasury and agency obligations;

(2) All fixed-income securities shall be rated A or better by Standard & Poors and Moody's;

(3) The plan's investments shall otherwise comply with RSA 402:28;

(4) No more than 25 percent of the plan's portfolio shall be invested in any one industry.

(5) Securities guaranteed by the United States Treasury shall be exempted from these restrictions.

[(d)] The commissioner shall have the exclusive authority to determine the amount of assets held by the plan that are in excess of the amounts of capital and reserves established in (b). In addition to the amount required for capital and reserves established in (b), the commissioner shall also set aside and shall not consider as excess, an amount equal to the total amount of any prior assessments imposed pursuant to Ins 1706.03(b), which amount shall be held and applied against and to reduce future assessments of the plan. The determination of excess assets shall be made using accepted actuarial methodologies and standards of practice. The process and timeframe by

which this determination is made shall be consistent with actuarial methodologies and standards of practice and RSA 404-F, RSA 412:15, 412:16 and 412:26, as well as the provisions of this chapter and Ins 902. The commissioner shall engage the services of an independent actuarial firm to support this determination.]

Ins 1704.09 Financial Statements.

(a) The plan shall annually file with the commissioner a financial statement, prepared in accordance with generally accepted accounting principles and the standards for reporting established by the governmental accounting standards board.

(b) The fiscal year of the plan shall end June 30 of each year.

(c) The financial statements shall be audited and certified to by an independent certified public accountant. If a certified public accountant has been designated pursuant to RSA 21-I:8, the board shall retain that accountant to audit and certify the financial statement.

(d) Financial statements shall be filed with the opinion of an actuary, retained in accordance with Ins 1704.01(a)(4)c and (b) and meeting the requirements of Ins 900, relating to the loss and loss adjustment expense reserves. The opinion shall be made in accordance with instructions established by the NAIC for licensed property and casualty insurers as described in RSA 400-A:36, I.

Ins 1704.10 Financial Accounting and Reporting. The accounts of the plan shall be reported on the financial statements of the state in accordance with generally accepted accounting principles and the standards for reporting established by the governmental accounting standards board.

Ins 1704.11 Defense and Indemnification.

(a) Directors and officers of the plan shall be entitled to defense and indemnification in accordance with the provisions and limitations of RSA 99-D.

(b) In the event that **a court of competent jurisdiction determines in a final unappealable order that the directors, officers or employees of the plan are not entitled to** defense and indemnification under RSA 99-D, **then the directors, officers or employees of the plan [is not available or applicable, any person made a party to any action, suit, or proceeding because the person is a director, officer or an employee of the plan]** shall be indemnified by the plan for all costs, including the amount of any judgment, including interest, settlement, fine or penalty, or expense incurred in connection with any **claim or civil action related to acts committed by a director, officer or employee while acting within the scope of official duty for the plan [such action, suit or proceeding including defense cost]**. However, such indemnification shall not be provided on any matter in which the person shall be finally adjudged to have committed a breach of duty involving bad faith, dishonesty, willful misfeasance or reckless disregard for the responsibilities of the person's office. In the event of settlement of a matter before final adjudication, payment shall be provided only upon the determination by the plan that no such breach was committed.

(c) The costs and expenses of indemnification provided under Ins 1704.11(b) shall be prorated and paid for by the required participants, each contributing in accordance with the methods of assessing required participants set out in Ins 1706.

Ins 1704.12 Hearings. Any **[required participant or]** applicant that seeks to obtain a medical malpractice insurance policy from the plan, **any policyholder, and any required participant, [who claims to have been]** aggrieved by any alleged failure of the plan to comply with this chapter or by any alleged improper act or ruling in the administration of the plan, shall have the right to a hearing before the commissioner pursuant to RSA 400-A:17, II, Ins 200, RSA 541-A and RSA 541.

PART Ins 1705 PERSONS REQUIRED TO PARTICIPATE IN THE PLAN AND TERM OF PARTICIPATION

Ins 1705.01 Persons Required to Participate. Every insurer authorized to write liability insurance of any kind on a direct basis within this state, including every insurer covering such perils in multiple peril package policies, shall be required to participate in the plan as a required participant and shall remain a required participant in the plan as a condition of its authority to write such insurance in this state.

Ins 1705.02 Term of Participation. The term of an insurer's status as a required participant in the plan shall commence on the first day of the fiscal year of the plan in which the insurer's authority to write liability insurance in this state is approved by the commissioner and shall terminate as of the last day of the fiscal year of the plan in which the insurer's authority to write liability insurance in this state is terminated.

Ins 1705.03 Effect of Termination of Participation in the Plan.

(a) With respect to all plan policies in force on the effective date of termination of a required participant's participation in the plan, the liability of the terminating insurer shall cease on the succeeding anniversary date of each such policy. Termination of participation in the plan shall not discharge or otherwise affect the insurer's obligations with respect to liabilities incurred prior to the anniversary date of such policies.

(b) The obligation of any required participant whose participation in the plan terminates shall continue with respect to its obligations incurred during its participation, including, without limitation, with respect to all claims and expenses associated with policies of the plan that were in existence during the period of participation.

(c) A required participant whose participation in the plan terminates shall continue to be liable to pay assessments with respect to all policy periods during which it was a required participant and until its proportionate share has been determined and paid. If the liability insurance policy portfolio of a required participant is purchased by, transferred to, or reinsured with another insurer, the latter shall automatically be deemed to have fully and unconditionally assumed such obligations of the required participant. Both the required participant and the assuming or acquiring insurer shall be required to notify the commissioner in writing of the transaction within 15 days of its occurrence.

Ins 1705.04 Effect of Merger or Consolidation Involving Required Participant. In the event of a merger or consolidation of a required participant, the continuing or surviving company shall automatically be deemed to have assumed all plan obligations of the merging or consolidating required participant. The required participant and the surviving company shall be required to provide written notice of the transaction to the commissioner within 15 days of its occurrence.

PART Ins 1706 BASIS OF PARTICIPATION OF REQUIRED PARTICIPANTS

Ins 1706.01 Proportionate Participation. Each required participant's participation in the plan shall be in the proportion that the net direct written premium by such required participant in this state during the preceding calendar year bears to the aggregate net direct premium written in this state during the preceding calendar year by all required participants in the plan. Each required participant's participation shall be determined on the basis of such net direct premiums as reported in the most recent annual statements filed by the insurer with the commissioner.

Ins 1706.02 Obligations of Required Participants.

(a) Every required participant shall be bound by the provisions of the plan of operation that is in effect and set forth in this chapter.

(b) Any unsatisfied obligation to the plan of any insolvent required participant shall be assumed by and apportioned among the remaining required participants in the plan in the manner provided in this part.

The plan shall have all rights and remedies allowed by law on behalf of the remaining required participants against the estate or funds of such insolvent required participant for sums due the plan pursuant to the provisions of RSA 402-C or the comparable provisions of any other state's laws.

(c) No claim against the plan shall create any severable liability of a required participant pursuant to RSA 404-C:2 III.

(d) Except as otherwise provided in this chapter, no assessment shall be levied against a required participant that has written no net direct premiums associated with liability insurance during the period for which the proportionate shares are based.

(e) The percentages enumerated in Ins 1706.01 used in the quantification of net direct written premium shall be updated by the board after an analysis, to be performed no more often than once every 5 years, and reviewed by the commissioner, who shall approve a change in allocation if there has been a material change to this allocation and if the revised allocation more accurately reflects current insurance business practices.

Ins 1706.03 Assessment of Required Participants for Deficits Incurred as a Result of Policies Issued on or After January 1, 1986.

(a) To the extent possible, losses and expenses of the plan incurred as a result of policies issued on or after January 1, 1986, shall be paid from premium written on plan business, including any amounts earned from the investment of such premium.

(b) Upon a determination by the board that losses and expenses of the plan described in (a) cannot be paid from premium written on plan business issued on or after January 1, 1986, including any amounts earned from the investment of such premium, the board shall recommend to the commissioner an assessment on all required participants in the plan. Any assessment imposed by the commissioner shall be collected from the required participants by the servicing organization(s) in accordance with RSA 404-C and this chapter. **Plan policies shall not be subject to assessment or surcharge for plan deficits incurred as a result of policies issued on or after January 1, 1986, notwithstanding any provision contained in any policy issued by the plan.**

(c) If the amount of assessment under (b) would place any required participant in the plan in a **hazardous financial condition as defined in Ins 2900 [jeopardy]**, the commissioner shall approve the reduction of the amount of assessment levied against such required participant, and the amount by which the assessment is reduced shall be allocated among the remaining required participants in accordance with the calculation set out in Ins 1706.01 with the basis of sharing adjusted to exclude the net direct premiums of the required participant in default. **[For the purposes of this paragraph, "financial jeopardy" means that the required participant would be placed at substantial risk of failing to meet financial requirements for continued licensure in the state if the assessment were to be imposed on it.]**

(d) **Rates used by a required participant shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments made under this section.** Assessments paid by required participants may be identified by the required participants as part of expense allowances filed pursuant to RSA 412:15 and RSA 412:16. **A required participant may disclose the amount of premium attributable to an assessment imposed pursuant to this part if the disclosure accurately reflects the expense allowance filed pursuant to RSA 412:15 and RSA 412:16. Alternately, required participants may recoup assessments paid under this section by means of a surcharge of future policies not to exceed 3 percent per annum of such premium. In the case of multiple peril policies, such surcharge shall apply solely to that portion of the premium used as the basis for participation in the plan.**

(e) **In accordance with Ins 1704.01(a)(5) and Ins 1704.01(b), the board with the approval of the commissioner, may enter into reinsurance agreements to reduce losses and expenses of the plan or to limit the possible amount of assessment under this section. The cost of such reinsurance shall be a valid expense of the plan.**

Ins 1706.04 Assessment for Deficits Incurred with Respect to SRF Policies.

(a) To the extent possible, losses and expenses of the plan incurred as a result of SRF policies shall be paid from the stabilization reserve fund account established pursuant to Ins 1707.

(b) A deficit in the stabilization reserve fund established pursuant to Ins 1707 shall exist when payment of, allocation of, or reserving for the plan's necessary administrative expenses, losses, loss adjustment expenses and reserves, including the incurred but not reported reserve for loss and loss adjustment expenses attributable to SRF policies, exceeds the assets held in the stabilization reserve fund.

(c) Upon a determination by the board that a deficit exists in the stabilization reserve fund, the board shall recommend to the commissioner an assessment on all required participants in the plan. Any assessment imposed by the commissioner shall be collected by the servicing organization(s) in accordance with RSA 404-C and this chapter and shall be held in the stabilization reserve fund. **Plan policies shall not be subject to assessment or surcharge for plan deficits incurred as a result of policies issued before January 1, 1986, notwithstanding any provision contained in any policy issued by the plan.**

(d) If the amount of any assessment imposed under (c) would place any required participant in the plan in **a hazardous financial condition as defined in Ins 2900 [jeopardy]**, the commissioner shall approve the reduction of the amount of assessment levied against such required participant, and the amount by which the assessment is reduced shall be allocated among the remaining required participants in accordance with the calculation set out in Ins 1706.01 with the basis of sharing adjusted to exclude the net direct premiums of the required participant in default. **[For the purposes of this paragraph, "financial jeopardy" means that the required participant would be placed at substantial risk of failing to meet financial requirements for continued licensure in the state if the assessment were to be imposed on it.]**

(e) **Rates used by a required participant shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments made under this section.** Assessments paid by required participants may be identified by the required participants as part of expense allowances filed pursuant to RSA 412:15 and RSA 412:16. **A required participant may disclose the amount of premium attributable to an assessment imposed pursuant to this part if the disclosure accurately reflects the expense allowance filed pursuant to RSA 412:15 and RSA 412:16. Alternately, required participants may recoup assessments paid under this section by means of a surcharge of future policies not to exceed 3 percent per annum of such premium. In the case of multiple peril policies, such surcharge shall apply solely to that portion of the premium used as the basis for participation in the plan.**

(e) In accordance with Ins 1704.01(a)(5) and Ins 1704.01(b), the board with the approval of the commissioner, may enter into reinsurance agreements to reduce losses and expenses incurred as a result of SRF policies reserve fund and avoid assessment under this section. The cost of such reinsurance shall be a valid expense of the plan.

Ins 1706.05 Joint Liability for Plan Business.

(a) In the event that after receiving written demand for payment of any assessment, any required participant fails, for any reason, to pay promptly its portion of any assessment, the servicing organization(s) shall report such failure to the commissioner for appropriate action.

(b) In the event that the assessment remains unpaid beyond 90 days, the remaining required participants shall be assessed in order to recover the amount of unpaid assessment. The increase in the assessment shall be computed on the basis of assessment established under Ins 1706.01, with the basis of sharing adjusted to exclude the net direct premiums of the required participant in default.

PART Ins 1707 STABILIZATION RESERVE FUND - SRF POLICIES

Ins 1707.01 Establishment of Stabilization Reserve Fund. The stabilization reserve fund is established for the purpose of ensuring **satisfaction [payment]** of all losses, all loss adjustment expenses and all operating expenses incurred with respect to the SRF policies.

Ins 1707.02 Operation of the Stabilization Reserve Fund.

(a) The board shall exercise all reasonable or necessary powers as set forth in Ins 1704.01 relating to the operation of the stabilization reserve fund, and the servicing organization(s) shall work with the board and the commissioner to administer the stabilization reserve fund in accordance with this chapter.

(b) The servicing organization(s) shall submit to the commissioner a summary of activities of the stabilization reserve fund during the previous fiscal year.

Ins 1707.03 Assets Held in the Stabilization Reserve Fund.

(a) Except as provide in Ins 1707.06:

[(a)] (1) All funds derived from stabilization reserve fund surcharges shall be held in the stabilization reserve fund.

[(b)] (2) All income generated by the investment of the funds held in the stabilization reserve fund shall be credited to the stabilization reserve fund.

Ins 1707.04 Financial Statements.

(a) The stabilization reserve fund shall annually file with the commissioner a financial statement, prepared in accordance with generally accepted accounting principles and the standards for reporting established by the governmental accounting standards board.

(b) The fiscal year of the stabilization reserve fund shall end June 30 of each year.

(c) The financial statements shall be audited and certified to by an independent certified public accountant. If a certified public accountant has been designated pursuant to RSA 21-I:8, the board shall retain that accountant to audit and certify the financial statement.

Ins 1707.05 Financial Accounting and Reporting. The accounts of the stabilization reserve fund shall be reported on the financial statements of the state in accordance with generally accepted accounting principles and the standards for reporting established by the governmental accounting standards board.

Ins 1707.06 Dissolution of Stabilization Reserve Fund.

(a) **Upon application by the board, and [A]** after a public hearing pursuant to RSA 400-A:17, I, the commissioner shall order the dissolution of the stabilization reserve fund if all known or reasonably ascertainable losses, including an adequate provision for incurred but not reported losses, all known or reasonably ascertainable loss adjustment expenses and all known or reasonably ascertainable operating expenses incurred as a result of SRF policies have been satisfied, **by one or more of the following: [consistent with accepted actuarial methodologies and standards of practice and RSA 404-F, RSA 412:15, 412:16 and 412:26, this chapter and Ins 902.]**

(1) By being ascertained and fully paid with the passage of time;

(2) Through a reinsurance arrangement entered into with an assuming reinsurance company; or

(3) Pursuant to paragraph (d).

(b) In connection with any dissolution, the commissioner shall develop a plan for allocation of any excess assets held by the stabilization reserve fund including any stabilization reserve fund surcharges and any amounts earned from investment of such surcharges, to the extent that such assets exceed the amount necessary to pay all known or reasonably ascertainable losses, including an adequate provision for incurred but not reported losses, all known or reasonably ascertainable loss adjustment expenses and all known or reasonably ascertainable operating expenses incurred as a result of SRF policies.

(c) Any plan established under (b) above shall provide for **the allocation of excess assets toward** repayment of any stabilization reserve fund surcharges paid by policyholders that purchased medical malpractice insurance between January 1, 1986 and December 31, 1993. Repayment shall be in a manner that is fair and equitable. The amount of repayment shall not exceed the total sum of the stabilization reserve fund surcharges imposed and paid by the policyholder(s).

(d) **[After the application in (c), any remaining excess stabilization reserve fund assets shall be transferred to the general assets of the plan. If there has been a dissolution of the plan and a distribution of plan assets in accordance with Ins 1708, any remaining assets of the stabilization reserve funds shall be distributed in accordance with Ins 1708.03.] Upon recommendation of the board and approval by the commissioner in accordance with Ins 1704.01(a)(1) and Ins 1704.01 (b), all liabilities, including known or reasonably ascertainable losses, an adequate provision for incurred by not reported losses, all know or reasonably ascertainable loss adjustment expenses and all known or reasonably ascertainable operating expenses incurred as a result of SRF policies, shall become liabilities of the plan and shall be paid out of the general assets of the plan. The determination of the amount of liabilities with respect to SRF policies assumed, shall be confirmed by receipt of an opinion of an independent actuary qualified in accordance with Ins 900. Assets in the stabilization reserve fund, up to an amount equal to the amount of liabilities with respect to SRF policies assumed by the plan, shall be transferred from the stabilization reserve fund to the general assets of the plan. If there are any remaining assets of the stabilization reserve fund, they shall be allocated to repay policyholders in accordance with paragraph (c).**

PART Ins 1708 TERMINATION OF THE PLAN WITH RESPECT TO POLICIES ISSUED ON OR AFTER JANUARY 1, 1986

Ins 1708.01 Termination of Plan. Pursuant to RSA 404-C:1 and RSA 412:13 and RSA 412:14, and after a public hearing pursuant to RSA 400-A:17, I, the commissioner shall issue an order of termination of the plan if the commissioner determines that:

- (a) Medical malpractice insurance is readily available in the voluntary market; or
- (b) It is otherwise in the public interest to terminate the plan.

Ins 1708.02 Plan of Dissolution.

(a) Upon the commissioner's order of termination of the plan under Ins 1708.01, the commissioner shall conduct a further public hearing pursuant to RSA 400-A:17, I to develop a plan of dissolution which shall include a plan for transfer of any assets of the plan that are not held as a separate account in the stabilization reserve fund, as set forth in this chapter. **Any plan of dissolution shall be adopted by rule in accordance with RSA 541-A.**

(b) If the stabilization reserve fund account has not been dissolved pursuant to Ins 1707.06, the plan of dissolution shall provide for further administration of the stabilization reserve fund account under a continuing plan of operation.

(c) The **board [commissioner]** shall determine **and the commissioner shall approve** the amount of assets of the plan not held as a separate account in the stabilization reserve fund, that exceed the amount

necessary to pay all known or reasonably ascertainable losses, including adequate provision for incurred but not reported losses, all known or reasonably ascertainable loss adjustment expenses and all known or reasonably ascertainable operating expenses incurred as a result of policies issued by the plan after January 1, 1986. This determination of excess assets shall be made using accepted actuarial methodologies and standards of practice. The process and timeframe by which this determination is made shall be consistent with actuarial methodologies and standards of practice and RSA 404-F, RSA 412:15, 412:16 and 412:26, as well as the provisions of this chapter and Ins 902.

Ins 1708.03 Final Use and Distribution of Plan Assets Upon Dissolution, Except for Stabilization Reserve Fund. Upon dissolution of the plan, all of the properties and assets of the plan, except for assets of the stabilization reserve fund that continue to be administered in accordance with Ins 1708.02(b) above, remaining after paying all known or reasonably ascertainable losses, including adequate provision for incurred but not reported losses, all known or reasonably ascertainable loss adjustment expenses and all known or reasonably ascertainable operating expenses incurred as a result of policies issued by the plan after January 1, 1986, shall be **[distributed and]** paid over **[as directed by law]** to[:

(a) **A] a** successor state plan established under RSA 404-C[;

(b) **The general fund of the state for programs that serve the purpose of the underlying plan;]**
or

[(c) A] as otherwise directed by law.

PART Ins 1709 EXEMPTION FROM PREMIUM TAX AND ASSESSMENT

Ins 1709.01 Exemption from Premium Tax and Assessment. The plan shall not report or pay the premium tax imposed under RSA 400-A:32 nor be subject to assessment imposed under RSA 400-A:32.

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