

By Senator Holzendorf

2-1078-98

1 A bill to be entitled
 2 An act relating to insurance; providing
 3 legislative intent with respect to encouraging
 4 the voluntary audit of activities regulated
 5 under the Florida Insurance Code; providing
 6 definitions; providing that an insurance
 7 compliance self-evaluative audit document is
 8 privileged information and not discoverable or
 9 admissible as evidence in a civil, criminal, or
 10 administrative proceeding; providing for
 11 certain information to be submitted to the
 12 Department of Insurance without waiving the
 13 privilege; specifying circumstances under which
 14 a court may compel the disclosure of material
 15 for which the privilege is asserted; providing
 16 procedures; providing for an in camera hearing;
 17 providing for certain stipulations to be made
 18 with respect to privileged information;
 19 providing for applicability; providing that the
 20 release of a self-evaluative audit document
 21 does not limit or abrogate certain other
 22 privileges; providing an effective date.

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 24 Be It Enacted by the Legislature of the State of Florida:
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26 Section 1. Privilege for insurance compliance
 27 self-evaluative audit documents; waiver of privilege.--
 28 (1) The Legislature recognizes that in order to
 29 encourage insurance companies and persons who conduct
 30 activities regulated under the Florida Insurance Code to
 31 conduct voluntary internal audits of compliance programs and

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

1 management systems and to assess and improve their compliance
2 with state and federal laws, rules, and orders, the
3 communications that relate to voluntary internal compliance
4 audits must be privileged and confidential. The Legislature
5 finds and declares that the protection of insurance consumers
6 is enhanced by the voluntary compliance of insurance companies
7 with the Florida Insurance Code and with other laws, and that
8 the public will benefit from incentives to identify and remedy
9 noncompliance. It is further declared that limited expansion
10 of the protection against disclosure of certain information
11 will encourage voluntary compliance and improve the quality of
12 the insurance market and that the voluntary provisions of this
13 section will not inhibit the regulatory authority of the
14 Department of Insurance.

15 (2) As used in this section, the term:

16 (a) "Company" includes every person engaged as
17 indemnitor, surety, or contractor in the business of entering
18 into contracts of insurance or of annuity.

19 (b) "Department" means the Department of Insurance.

20 (c) "Insurance compliance audit" means a voluntary
21 internal evaluation, review, assessment, audit, or
22 investigation that is conducted for the purpose of identifying
23 or preventing noncompliance, or for promoting compliance, with
24 laws, rules, orders, or industry or professional standards,
25 and that is conducted by or on behalf of a company licensed or
26 regulated under the Florida Insurance Code or involves an
27 activity regulated under the Florida Insurance Code.

28 (d) "Insurance compliance self-evaluative audit
29 document" means a document prepared as a result of or in
30 connection with an insurance compliance audit. The term
31 includes, but is not limited to, a written response to the

1 findings of an insurance compliance audit, field notes and
2 records of observations, findings, opinions, suggestions,
3 conclusions, drafts, memoranda, drawings, photographs,
4 exhibits, computer-generated or electrically recorded
5 information, phone records, maps, charts, graphs, and surveys
6 collected or developed for the primary purpose of and in the
7 course of an insurance compliance audit. The term also
8 includes, but is not limited to:

9 1. An insurance compliance audit report prepared by an
10 auditor, who may be an employee of the company or an
11 independent contractor, which may include the scope of the
12 audit, the information gained in the audit, conclusions and
13 recommendations, and exhibits and appendices.

14 2. Memoranda and documents that analyze portions or
15 all of the insurance compliance audit report and discuss
16 potential implementation issues.

17 3. An implementation plan that addresses correcting
18 past noncompliance, improving current compliance, and
19 preventing future noncompliance.

20 4. Analytic data generated in the course of conducting
21 the insurance compliance audit.

22 (3)(a) Except as provided in subsection (4) or
23 subsection (5), an insurance compliance self-evaluative audit
24 document is privileged information and is not discoverable or
25 admissible as evidence in any legal action in any civil,
26 criminal, or administrative proceeding. The privilege created
27 in this section is a matter of substantive law and is not
28 merely a procedural matter governing civil or criminal
29 procedures in the courts of this state.

30 (b) If any company, person, or entity performs or
31 directs the performance of an insurance compliance audit, an

1 officer, employee, or agent involved with the insurance
2 compliance audit, or any consultant who is hired for the
3 purpose of performing the insurance compliance audit, may not
4 be examined in any civil, criminal, or administrative
5 proceeding as to the insurance compliance audit or any
6 insurance compliance self-evaluative audit document. This
7 paragraph does not apply if the privilege set forth in
8 paragraph (a) is determined not to apply as provided in
9 subsection (4) or subsection (5).

10 (c) A company may voluntarily submit, in connection
11 with an examination conducted under the Florida Insurance
12 Code, an insurance compliance self-evaluative audit document
13 to the department, or to a designee of the department, as a
14 confidential document without waiving the privilege set forth
15 in this section to which the company would otherwise be
16 entitled. The department may not disclose information
17 contained in a voluntarily submitted insurance compliance
18 self-evaluative audit document to the National Association of
19 Insurance Commissioners. To the extent that the department may
20 compel disclosure of an insurance compliance self-evaluative
21 audit document under other provisions of law, any such report
22 furnished to the department may not be provided to any other
23 person or entity and shall be accorded the same
24 confidentiality and other protections as are provided for
25 voluntarily submitted documents. Any use of an insurance
26 compliance self-evaluative audit document furnished as a
27 result of a request of the department under a claim of
28 authority to compel disclosure is limited to determining
29 whether any disclosed defects in an insurer's policies and
30 procedures or inappropriate treatment of customers has been

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1 remedied or that an appropriate plan for such remedy is in
2 place.

3 1. A company's compliance self-evaluative audit
4 document submitted to the department shall remain subject to
5 all applicable statutory or common law privileges, including,
6 but not limited to, the work-product doctrine, attorney-client
7 privilege, and the exclusion provided for subsequent remedial
8 measures.

9 2. Any compliance self-evaluative audit document
10 submitted and in the possession of the department shall remain
11 the property of the company.

12 (d) Disclosure of an insurance compliance
13 self-evaluative audit document to a governmental agency,
14 whether voluntary or pursuant to compulsion of law, does not
15 constitute a waiver of the privilege set forth in subsection
16 (3) with respect to any other person or any other governmental
17 agency.

18 (4)(a) The privilege set forth in subsection (3) does
19 not apply to the extent that it is expressly waived by the
20 company that prepared or caused to be prepared the insurance
21 compliance self-evaluative audit document.

22 (b) In a civil or administrative proceeding, a court
23 of record may, after an in camera review, require disclosure
24 of material for which the privilege set forth in subsection
25 (3) is asserted, if the court determines one of the following:

26 1. The privilege is asserted for a fraudulent purpose;
27 or

28 2. The material is not subject to the privilege.

29 (c) In a criminal proceeding, a court of record may,
30 after an in camera review, require disclosure of material for
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1 which the privilege described in subsection (3) is asserted,
2 if the court determines one of the following:

3 1. The privilege is asserted for a fraudulent purpose;

4 2. The material is not subject to the privilege; or

5 3. The material contains evidence relevant to
6 commission of a criminal offense under the Florida Insurance
7 Code, and all three of the following factors are present:

8 a. The department, a state attorney, or the Attorney
9 General has a compelling need for the information;

10 b. The information is not otherwise available; and

11 c. The department, a state attorney, or the Attorney
12 General is unable to obtain the substantial equivalent of the
13 information by any other means without incurring unreasonable
14 cost and delay.

15 (5)(a) Within 30 days after the department, a state
16 attorney, or the Attorney General serves on an insurer a
17 written request by certified mail for disclosure of an
18 insurance compliance self-evaluative audit document under this
19 section, the company that prepared or caused the document to
20 be prepared may file with the appropriate court a petition
21 requesting an in camera hearing on whether the insurance
22 compliance self-evaluative audit document or portions of the
23 document are privileged under this section or subject to
24 disclosure. The court has jurisdiction over a petition filed
25 by a company under this subsection requesting an in camera
26 hearing on whether the insurance compliance self-evaluative
27 audit document or portions of the document are privileged or
28 subject to disclosure. Failure by the company to file a
29 petition waives the privilege for this request only.

30 (b) A company that asserts the insurance compliance
31 self-evaluative privilege in response to a request for

1 disclosure under this subsection must include in its request
2 for an in camera hearing all of the information set forth in
3 paragraph (e).

4 (c) Upon the filing of a petition under this section,
5 the court shall issue an order scheduling, within 45 days
6 after the filing of the petition, an in camera hearing to
7 determine whether the insurance compliance self-evaluative
8 audit document or portions of the document are privileged
9 under this section or subject to disclosure.

10 (d) The court, after an in camera review, may require
11 disclosure of material for which the privilege in subsection
12 (3) is asserted if the court determines, based upon its in
13 camera review, that any one of the conditions set forth in
14 paragraph (4)(b) is applicable as to a civil or administrative
15 proceeding or that any one of the conditions set forth in
16 paragraph (4)(c) is applicable as to a criminal proceeding.
17 Upon making such a determination, the court may compel the
18 disclosure only of those portions of an insurance compliance
19 self-evaluative audit document that are relevant to issues in
20 dispute in the underlying proceeding. Any compelled disclosure
21 is not a public document and is not a waiver of the privilege
22 for any other civil, criminal, or administrative proceeding. A
23 party that unsuccessfully opposes disclosure may apply to the
24 court for an appropriate order protecting the document from
25 further disclosure.

26 (e) A company that asserts the insurance compliance
27 self-evaluative privilege in response to a request for
28 disclosure under this subsection shall provide to the
29 department, the state attorney, or the Attorney General, as
30 appropriate, at the time of filing any objection to the
31 disclosure, all of the following:

1 1. The date of the insurance compliance
2 self-evaluative audit document.

3 2. The identity of the entity that conducted the
4 audit.

5 3. The general nature of the activities covered by the
6 insurance compliance audit.

7 4. An identification of the portions of the insurance
8 compliance self-evaluative audit document for which the
9 privilege is being asserted.

10 (6)(a) A company that asserts the insurance compliance
11 self-evaluative privilege set forth in subsection (3) has the
12 burden of demonstrating the applicability of the privilege.

13 Once a company has established the applicability of the
14 privilege, a party that seeks disclosure under paragraph
15 (4)(b) has the burden of proving that the privilege is
16 asserted for a fraudulent purpose. The department, the state
17 attorney, or the Attorney General seeking disclosure under
18 paragraph (4)(c) has the burden of providing the elements set
19 forth in paragraph (4)(c).

20 (b) The parties may at any time stipulate in
21 proceedings under subsection (4) or subsection (5) to entry of
22 an order directing that specific information contained in an
23 insurance compliance self-evaluative audit document is or is
24 not subject to the privilege provided under subsection (3).
25 Any such stipulation may be limited to the instant proceeding
26 and, absent specific language to the contrary, is not
27 applicable to any other proceeding.

28 (c) The privilege set forth in subsection (3) does not
29 extend to:

30 1. Documents, communications, data, reports, or other
31 information expressly required to be collected, developed,

1 maintained, or reported to a regulatory agency pursuant to the
2 Florida Insurance Code or other state or federal law;

3 2. Information obtained by observation or monitoring
4 by any regulatory agency; or

5 3. Information obtained from a source that is
6 independent of the insurance compliance audit.

7 (7) The insurance compliance self-evaluative privilege
8 created by this section applies to all litigation or any
9 administrative proceeding pending on July 1, 1998.

10 (8) This section, or the release of any
11 self-evaluative audit document under this section, does not
12 limit, waive, or abrogate the scope or nature of any statutory
13 or common law privilege, including, but not limited to, the
14 work-product doctrine, the attorney-client privilege, and the
15 exclusion provided for subsequent remedial measures.

16 Section 2. This act shall take effect July 1, 1998.

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SENATE SUMMARY

20 Provides that a document produced as the result of a
21 voluntary audit of activities regulated under the Florida
22 Insurance Code is privileged information and is not
23 discoverable or admissible as evidence in any civil,
24 criminal, or administrative proceeding. Authorizes a
25 court to compel the disclosure of material for which the
26 privilege is asserted following an in camera hearing.
27 Specifies documents and information for which an
28 insurance company may not claim the privilege. (See bill
29 for details.)
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