

Senate Bill 674 (as enrolled)
Sponsor: Senator Bill Bullard, Jr.
Senate Committee: Financial Services
House Committee: Insurance and Financial Services

PUBLIC ACT 275 of 2001

Date Completed: 4-8-02

RATIONALE

Although insurers are subject to examination by State regulators, some companies also are interested in undergoing an independent audit to determine whether they are in compliance with State and Federal regulations. Insurers apparently are reluctant to do so, however, due to fear that an audit report will become a public document. For example, an audit might reveal that an insurer was not complying with a statute that had been amended, because the insurer was not aware of the amendment. Although the insurer would need to correct its practice in order to meet governmental standards, it would not want information about the noncompliance to be publicized. To encourage insurers to engage in self-evaluations and ensure their compliance with current laws, it was suggested that these audits and audit reports be granted a statutory privilege that will keep them confidential.

CONTENT

The bill amended the Insurance Code to create an "insurance compliance self-evaluative audit document" privilege, which means that the document may not be admitted as evidence in a civil, criminal, or administrative proceeding and a person who prepared the audit may not be compelled to testify about it. The bill also does the following:

- Provides for the confidentiality and privilege of a document submitted to the Commissioner of the Office of Financial and Insurance Services (OFIS).**
- Specifies that the privilege does not apply if a court requires disclosure**

after a private hearing.

- Establishes the burden of proof for asserting a privilege or grounds for disclosure.**
- Exempts specific information from the privilege.**

The bill defines "insurance compliance self-evaluative audit document" as a document prepared as a result of or in connection with an insurance compliance audit; it may include a written response to the findings of such an audit. (This term is described more fully below.) "Insurance compliance audit" means a voluntary, internal evaluation, review, assessment, audit, or investigation for the purpose of identifying or preventing noncompliance with or promoting compliance with laws, regulations, orders, or industry or professional standards, conducted by or on behalf of an insurer licensed or regulated under the Code or involving an activity regulated under the Code.

Creation of Privilege

Except as otherwise provided in the bill, an insurance compliance self-evaluative audit document is privileged information and is not discoverable or admissible as evidence in any civil, criminal, or administrative proceeding. Also, except as otherwise provided in the bill, a person involved in preparing such an audit or audit document is not subject to examination concerning the audit or audit document in any civil, criminal, or administrative proceeding. If the audit or audit document or any portion of it is not privileged, however, the individual involved in its preparation may be examined concerning the portion that is not privileged.

A person involved in preparing an insurance compliance self-evaluative audit or audit document who becomes aware of any alleged criminal violation of the Code must report that act to the insurer. Within 30 days after receiving the report, the insurer must give the information to the Commissioner.

If the document is disclosed to a governmental agency, whether voluntarily or as compelled by law, the disclosure does not constitute a waiver of the privileges with respect to any other person or governmental agency.

Neither of the privileges applies to the extent that it is expressly waived by the insurer that prepared the document or caused it to be prepared.

The bill states that it does not limit, waive, or abrogate the scope or nature of any other statutory or common law privilege.

Submission to Commissioner

If an insurance compliance self-evaluative audit document is furnished to the Commissioner voluntarily or as a result of a request of the Commissioner under a claim of authority to compel disclosure under the bill, the Commissioner may not provide the document to any other person, and it must be given the same confidentiality and protections as provided in Section 222(7) of the Code, without waiver of the privileges described above. Any use of the document is limited to determining whether any disclosed defects in an insurer's policies and procedures or inappropriate treatment of customers has been remedied or that an appropriate plan for remedy is in place. (Section 222(7) requires an examination report to be withheld from public inspection until it is finalized and filed with the Commissioner; allows the Commissioner to withhold any examination report from the public as long as he or she considers proper; and provides that all information furnished to OFIS and related to an examination report or investigation is confidential.)

An insurance compliance self-evaluative audit document submitted to the Commissioner remains subject to all applicable statutory or common law privileges, including the work product doctrine, the attorney-client privilege,

and the subsequent remedial measures exclusion. A document submitted to the Commissioner remains the property of the insurer and is not subject to disclosure under the Freedom of Information Act.

Court-Required Disclosure

The privileges created by the bill do not apply if a court, after an in camera (private) review, requires disclosure in a civil, administrative, or criminal proceeding after determining that the privilege is asserted for a fraudulent purpose and/or that the material is not subject to the privilege as provided in the bill.

The privileges also do not apply in a criminal proceeding if the court determines, after an in camera review, that the material contains evidence relevant to the commission of a criminal offense under the Code.

Within 14 days after the Commissioner or the Attorney General makes a written request by certified mail for disclosure of an insurance compliance self-evaluative audit document, the insurer that prepared the document or had it prepared may file with the Ingham County Circuit Court a petition requesting an in camera hearing on whether the document or portions of it are subject to disclosure. An insurer's failure to file a petition waives the privilege for that request. An insurer asserting the privilege in response to a request for disclosure must include in its request for a hearing all of the following information:

- The date of the document.
- The identity of the entity or individual conducting the audit.
- The general nature of the activities covered by the audit.
- An identification of the portions of the document for which the privilege is being asserted.

Within 30 days after the petition is filed, the court must issue an order scheduling an in camera hearing.

If a court requires disclosure as described above, it may compel the disclosure of only those portions of a document relevant to issues in dispute in the underlying proceeding. Information required to be disclosed may not be considered a public document or a waiver

of the privilege for any other civil, criminal, or administrative proceeding.

the ordinary course of business.

Assertion of Privilege

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SFA



An insurer asserting the privilege in response to a request for disclosure by the

Commissioner or the Attorney General, must give the Commissioner or the Attorney General, at the time of filing any objection to the disclosure, the same the information that must be included if an insurer files a petition for an in camera hearing.

The insurer has the burden of demonstrating that the privilege applies. Once the insurer has met that burden, a party seeking disclosure in a civil or administrative proceeding on the ground that the privilege is asserted for a fraudulent purpose, has the burden of proving that. If the Commissioner or Attorney General is seeking disclosure in a criminal proceeding on the ground that the material contains relevant evidence, the Commissioner or Attorney General has the burden of proving the elements of that ground for disclosure.

In proceedings under the bill, the parties may stipulate at any time to entry of an order directing that specific information contained in an insurance compliance self-evaluative audit document is or is not subject to the privilege. Any such stipulation may be limited to that particular proceeding and, absent specific language to the contrary, does not apply to any other proceeding.

Exceptions

The privileges created by the bill do not extend to any of the following:

- Documents, communications, data, reports, or other information expressly required to be collected, developed, maintained, or reported to a regulatory agency under the Code or other Federal or State law.
- Information obtained by observation or monitoring by any regulatory agency.
- Information obtained from a source independent of the insurance compliance audit.
- Documents, communication, data, reports, memoranda, drawings, photographs, exhibits, computer records, maps, charts, graphs, and surveys kept or prepared in

Definition

BILL ANALYSIS

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An insurance compliance self-evaluative audit document may include field notes and drafts of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits, computer-generated or electronically recorded information, phone records, maps, charts, graphs, and surveys, if this supporting information is collected or prepared in the course of an insurance compliance audit or attached as an exhibit to the audit. An insurance compliance self-evaluative audit document also includes any of the following:

- An insurance compliance audit report prepared by an auditor, who may be an employee of the insurer or an independent contractor. The report may include the scope of the audit, the information gained in it, and conclusions and recommendations, with exhibits and appendices.
- Memoranda and documents analyzing portions or all of the insurance compliance audit report and discussing potential implementation issues.
- An implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance.
- Analytic data generated in the course of conducting the insurance compliance audit.

MCL 500.221

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill will encourage insurance companies to undergo self-evaluations to identify noncompliance with the law and promote compliance. Since insurance regulations are complex and constantly changing, it is entirely possible that an insurer might inadvertently fail to comply with current law. For example, a statute governing the computation of interest on an annuity might be amended to require a different actuarial standard. If an insurer is not aware that the law was changed,