

Stricken language would be deleted from and underlined language would be added to law as it existed prior to the 82nd General Assembly.

1 State of Arkansas  
2 82nd General Assembly  
3 Regular Session, 1999  
4

As Engrossed: H3/11/99 H4/1/99

## A Bill

HOUSE BILL 1994

5 By: Representative T. Smith  
6  
7

### For An Act To Be Entitled

9 "AN ACT TO ESTABLISH AN INSURANCE COMPLIANCE SELF-  
10 EVALUATIVE PRIVILEGE. "

### Subtitle

13 "AN ACT TO ESTABLISH AN INSURANCE  
14 COMPLIANCE SELF-EVALUATIVE PRIVILEGE. "

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16  
17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
18

19 SECTION 1. Short Title.

20 This act may be cited as the Insurance Compliance Self-Evaluative Privilege  
21 Act.

22  
23 SECTION 2. Purposes.

24 To encourage insurance companies and persons conducting activities  
25 regulated under this act, both to conduct voluntary internal audits of their  
26 compliance programs and management systems and to assess and improve  
27 compliance with state and federal statutes, rules, and orders, an insurance  
28 compliance self-evaluative privilege is recognized to protect the  
29 confidentiality of all documents and communications relating to voluntary  
30 internal compliance audits. The General Assembly hereby finds and declares  
31 that protection of insurance consumers is enhanced by insurers' voluntary  
32 compliance with insurance regulatory laws and other laws, and that the public  
33 and insurers will benefit from incentives to identify and remedy insurance and  
34 other compliance problems. It is further declared that limited expansion of  
35 the protection against disclosures will encourage voluntary compliance and  
36 improve insurance market conduct quality, and that the provisions of this

1 section will not inhibit the exercise of the regulatory authority by those  
2 entrusted with protecting insurance consumers.

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4 SECTION 3. Definitions.

5 For the purpose of this act, the following definitions apply:

6 (1) "Code" means the Arkansas Insurance Code, constituting Subtitle 3  
7 of Title 23 of the Arkansas Code of 1987, as amended;

8 (2) "Commissioner" means the Insurance Commissioner for the State of  
9 Arkansas;

10 (3) "Insurance compliance audit" means a voluntary, internal  
11 evaluation, review, assessment, audit, or investigation for the purpose of  
12 identifying or preventing noncompliance with, or promoting compliance with,  
13 laws, regulations, orders, or industry or professional standards, which is  
14 conducted, whether within or outside this state, by or on behalf of a company  
15 licensed or regulated under this act, or which involves an activity regulated  
16 under this act;

17 (4) "Insurance compliance self-evaluative audit document" means a  
18 document or documents prepared as a result of or in connection with an  
19 insurance compliance audit. An insurance compliance self-evaluative audit  
20 document may include a written response to the findings of an insurance  
21 compliance audit. An insurance compliance self-evaluative audit document may  
22 include, but is not limited to, as applicable, field notes and records of  
23 observations, findings, opinions, suggestions, conclusions, drafts, memoranda,  
24 drawings, photographs, exhibits, computer-generated or electronically recorded  
25 information, phone records, maps, charts, graphs, and surveys, provided this  
26 supporting information is collected or developed for the primary purpose and  
27 in the course of an insurance compliance audit. An insurance compliance self-  
28 evaluative audit document also includes, but is not limited to, any of the  
29 following:

30 (A) An insurance compliance audit report prepared by an auditor,  
31 who may be an employee of the company, an employee of an affiliate of the  
32 company, or an independent contractor, which may include the scope of the  
33 audit, the information gained in the audit, and conclusions and  
34 recommendations, with exhibits and appendices;

35 (B) Memoranda and documents analyzing portions or all of the  
36 insurance compliance audit report and discussing potential implementation

1 issues;

2 (C) An implementation plan that addresses correction of past  
3 noncompliance, improvement in current compliance, and prevention of future  
4 noncompliance; or

5 (D) Analytic data generated in the course of conducting the  
6 insurance compliance audit; and

7 (5) "Company" means insurers, health maintenance organizations, and any  
8 other entities subject to examination by the commissioner pursuant to Arkansas  
9 Code 23-61-201 through 208.

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11 SECTION 4. The Privilege.

12 (a) Except as provided in section 5, an insurance compliance self-  
13 evaluative audit document is privileged information and is not discoverable or  
14 admissible as evidence in any legal action in any civil, criminal, or  
15 administrative proceeding. The privilege created herein is a matter of  
16 substantive law of this state and is not merely a procedural matter governing  
17 civil or criminal procedures in the courts of this state. The privilege, when  
18 asserted by a company domiciled in this state, shall be entitled to full faith  
19 and credit in all jurisdictions.

20 (b) If any company, person, or entity performs or directs the  
21 performance of an insurance compliance audit, then any officer, employee or  
22 agent involved with the insurance compliance audit, or any consultant who is  
23 hired for the purpose of performing the insurance compliance audit, may not be  
24 examined in any civil, criminal, or administrative proceeding as to the  
25 insurance compliance audit or any insurance compliance self-evaluative audit  
26 document, as defined in this section. This subsection (b) does not apply if  
27 the privilege set forth in subsection (a) of this section is determined under  
28 section 5 not to apply.

29 (c)(1) A company may voluntarily submit, in connection with  
30 examinations conducted under this act, an insurance compliance self-evaluative  
31 audit document to the commissioner, or his or her designee, as a confidential  
32 document under Arkansas Code 23-61-207 without waiving the privilege set forth  
33 in this act to which the company would otherwise be entitled; provided,  
34 however, that the provisions in Arkansas Code 23-61-207 permitting the  
35 commissioner to make confidential documents public pursuant to Arkansas Code  
36 23-61-205(c) and (d) and access by the National Association of Insurance

1 Commissioners shall not apply to the insurance compliance self-evaluative  
2 audit document so voluntarily submitted. To the extent that the commissioner  
3 has the authority to compel the disclosure of an insurance compliance self-  
4 evaluative audit document under other provisions of applicable law, any such  
5 document furnished to the commissioner shall not be provided to any other  
6 persons or entities and shall be accorded the same confidentiality and other  
7 protections as provided above for voluntarily submitted documents. Any use of  
8 an insurance compliance self-evaluative audit document furnished as a result  
9 of a request of the commissioner under a claim of authority to compel  
10 disclosure shall be limited to determining whether or not any disclosed  
11 defects in an insurers' policies and procedures or inappropriate treatment of  
12 customers have been remedied or that an appropriate plan for their remedy is  
13 in place.

14 (2) A company's insurance compliance self-evaluative audit  
15 document submitted to the commissioner shall remain subject to all applicable  
16 statutory or common law privileges including, but not limited to, the work  
17 product doctrine, attorney-client privilege, or the subsequent remedial  
18 measures exclusion.

19 (3) Any insurance compliance self-evaluative audit document so  
20 submitted and in the possession of the commissioner shall remain the property  
21 of the company and shall not be subject to any further disclosure or  
22 production.

23 (d) Disclosure of an insurance compliance self-evaluative audit  
24 document to a governmental agency, whether voluntary or pursuant to compulsion  
25 of law, shall not constitute a waiver of the privilege set forth in subsection  
26 (a) of this section with respect to any other persons or any other  
27 governmental agencies.

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29 SECTION 5. Waiver - Court-Compelled Disclosure.

30 (a) The privilege set forth in section 4 does not apply to the extent  
31 that it is expressly waived by the company that prepared or caused to be  
32 prepared the insurance compliance self-evaluative audit document.

33 (b) In a civil or administrative proceeding, a court of record may,  
34 after an in-camera review, require disclosure of material for which the  
35 privilege set forth in section 4 of this act is asserted, if the court  
36 determines one of the following:

1           (1) The privilege is asserted for a fraudulent purpose;  
2           (2) The material is not subject to the privilege; or  
3           (3) Even if subject to the privilege, the material shows evidence  
4 of noncompliance with state and federal statutes, rules and orders and the  
5 company failed to undertake reasonable corrective action or eliminate such  
6 noncompliance within a reasonable time. Provided however, the disclosure of  
7 evidence of such noncompliance with state and federal statutes, rules and  
8 orders, and the company's failure to undertake reasonable corrective action or  
9 eliminate such noncompliance within a reasonable time, shall be limited to the  
10 commissioner.

11           (c) In a criminal proceeding, a court of record may, after an in-camera  
12 review, require disclosure of material for which the privilege described in  
13 section 4 of this act is asserted, if the court determines one of the  
14 following:

15           (1) The privilege is asserted for a fraudulent purpose;  
16           (2) The material is not subject to the privilege;  
17           (3) Even if subject to the privilege, the material shows evidence  
18 of noncompliance with state and federal statutes, rules and orders and the  
19 company failed to undertake reasonable corrective action or eliminate such  
20 noncompliance within a reasonable time; or

21           (4) The material contains evidence relevant to commission of a  
22 criminal offense under this act, and all three (3) of the following factors  
23 are present:

24                   (A) The commissioner, prosecuting attorney, or Attorney  
25 General has a compelling need for the information; and

26                   (B) The information is not otherwise available; and

27                   (C) The commissioner, prosecuting attorney, or Attorney  
28 General is unable to obtain the substantial equivalent of the information by  
29 any other means without incurring unreasonable cost and delay.

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31           SECTION 6. Procedure to Assert Privilege.

32           (a) Within thirty (30) calendar days after the commissioner,  
33 prosecuting attorney, or Attorney General serves on an insurer a written  
34 request by certified mail for disclosure of an insurance compliance self-  
35 evaluative audit document under this act, the company that prepared or caused  
36 the document to be prepared may file with the appropriate court a petition

1 requesting an in-camera hearing on whether the insurance compliance self-  
2 evaluative audit document or portions of the document are privileged under  
3 this act or subject to disclosure. The court has jurisdiction over a petition  
4 filed by a company under this subsection requesting an in-camera hearing on  
5 whether the insurance compliance self-evaluative audit document or portions of  
6 the document are privileged or subject to disclosure. Failure by the company  
7 to file a petition waives the privilege for this request only.

8 (b) A company asserting the insurance compliance self-evaluative  
9 privilege in response to a request for disclosure under this subsection shall  
10 include in its request for an in-camera hearing all of the information set  
11 forth in subsection (e) of this section.

12 (c) Upon the filing of a petition under this section, the court shall  
13 issue an order scheduling, within forty-five (45) calendar days after the  
14 filing of the petition, an in-camera hearing to determine whether the  
15 insurance compliance self-evaluative audit document or portions of the  
16 document are privileged under this section or subject to disclosure.

17 (d) The court, after an in-camera review, may require disclosure of  
18 material for which the privilege in section 4 of this act is asserted if the  
19 court determines, based upon its in-camera review, that any one of the  
20 conditions set forth in subsections 5(b)(1), (2), and (3) are applicable as to  
21 a civil or administrative proceeding or that any one of the conditions set  
22 forth in subsections 5(c)(1) through (4) is applicable as to a criminal  
23 proceeding. Upon making such a determination, the court may compel the  
24 disclosure only of those portions of an insurance compliance self-evaluative  
25 audit document relevant to issues in dispute in the underlying proceeding.  
26 Any compelled disclosure will not be considered to be a public document or be  
27 deemed to be a waiver of the privilege for any other civil, criminal, or  
28 administrative proceeding. A party unsuccessfully opposing disclosure may  
29 apply to the court for an appropriate order protecting the document from  
30 further disclosure.

31 (e) A company asserting the insurance compliance self-evaluative  
32 privilege in response to a request for disclosure under this section 6 shall  
33 provide to the commissioner, prosecuting attorney, or Attorney General, as the  
34 case may be, at the time of filing any objection to the disclosure, all of the  
35 following information:

36 (1) The date of the insurance compliance self-evaluative audit

1 document;

2 (2) The identity of the entity conducting the audit;

3 (3) The general nature of the activities covered by the insurance  
4 compliance audit; and

5 (4) An identification of the portions of the insurance compliance  
6 self-evaluative audit document for which the privilege is being asserted.

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8 SECTION 7. Burden of Proof - Stipulations.

9 (a) A company asserting the insurance compliance self-evaluative  
10 privilege set forth in section 4 has the burden of demonstrating the  
11 applicability of the privilege. Once a company has established the  
12 applicability of the privilege, a party seeking disclosure under subsections  
13 5(b)(1) and (3) has the burden of proving that the privilege is asserted for a  
14 fraudulent purpose. The commissioner, prosecuting attorney, or Attorney  
15 General seeking disclosure under subsection 5(c) has the burden of proving the  
16 elements set forth in subsection 5(c).

17 (b) The parties may at any time stipulate in proceedings under sections  
18 5 or 6 of this act to entry of an order directing that specific information  
19 contained in an insurance compliance self-evaluative audit document is or is  
20 not subject to the privilege provided under section 4. Any such stipulation  
21 may be limited to the instant proceeding and, absent specific language to the  
22 contrary, shall not be applicable to any other proceeding.

23  
24 SECTION 8. Documents Not Subject to Privilege.

25 The privilege set forth in section 4 shall not extend to any of the  
26 following:

27 (1) Documents, communications, data, reports, or other information  
28 expressly required to be collected, developed, maintained, or reported to a  
29 regulatory agency pursuant to this act, or other federal or state law;

30 (2) Information obtained by routine observation or monitoring by any  
31 regulatory agency; or

32 (3) Information obtained from a source independent of the insurance  
33 compliance audit.

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35 SECTION 9. The insurance compliance self-evaluative privilege created  
36 by this act shall apply to all litigation or administrative proceedings

1 pending at the effective date of this act.

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3 SECTION 10. Nothing in this act nor the release of any self-evaluative  
4 audit document hereunder shall limit, waive, or abrogate the scope or nature  
5 of any statutory or common law privilege including, but not limited to, the  
6 work product doctrine, the attorney-client privilege, or the subsequent  
7 remedial measures exclusion.

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9 SECTION 11. All provisions of this act of a general and permanent  
10 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas  
11 Code Revision Commission shall incorporate the same in the Code.

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13 SECTION 12. If any provision of this act or the application thereof to  
14 any person or circumstance is held invalid, such invalidity shall not affect  
15 other provisions or applications of the act which can be given effect without  
16 the invalid provision or application, and to this end the provisions of this  
17 act are declared to be severable.

18  
19 SECTION 13. All laws and parts of laws in conflict with this act are  
20 hereby repealed.

21 /s/ T. Smith