

## HOUSE BILL No. 2946

By Committee on Insurance

2-14

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AN ACT concerning insurance; relating to insurance self-compliance audits.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. (a) As used in this act:

(1) "Agency" means all federal and state boards, commissions, departments or officers and includes the commissioner.

(2) "Commissioner" means the commissioner of insurance as defined by K.S.A 40-102, and amendments thereto.

(3) "Communication" means any oral or written communication and information relating to an insurance compliance self-audit and includes an insurance compliance self-audit document.

(4) "Hearing officer" means an individual appointed to conduct a hearing in an agency proceeding. Except as provided by the Kansas administrative procedures act, and amendments thereto, the hearing officer may be the commissioner or one or more staff employees of the insurance department.

(5) "Insurance compliance self-audit" means a process of internal evaluation, review, assessment, or audit not otherwise expressly required by law of an insurer, of an activity regulated under chapter 40 of the Kansas statutes annotated, and amendments thereto, the insurance laws or other laws of another state or any other state or federal law applicable to:

(A) An insurer; or

(B) a management system related to the insurer or the regulated activity, which management system is designed to identify and prevent non-compliance or to improve compliance with such statutes, regulations, bulletins, rules, orders or systems. An insurance compliance self-audit may be conducted by the insurer, its agents, officers or employees, or by independent contractors.

(6) "Insurance compliance self-audit document" means any document prepared as a result of, or in connection with an insurance compliance self-audit. Insurance compliance self-audit document does not include documents existing prior to the inception of an insurance compliance self-audit, nor shall the collection of such documents in the

1 course of an insurance compliance self-audit subject any such document  
2 to the privilege set forth in sections 2 and 3, and amendments thereto,  
3 of this act. An insurance compliance document includes a written re-  
4 sponse to the findings of an insurance compliance self-audit, findings,  
5 opinions, conclusions, drafts, memoranda, computer-generated or elec-  
6 tronically recorded information and phone records, provided this infor-  
7 mation is collected or developed for the primary purpose and in the  
8 course of an insurance compliance self-audit. An insurance compliance  
9 self-audit document also includes any of the following:

10 (A) A report prepared by an auditor, who may be an agent or em-  
11 ployee of the insurer or an independent contractor, which may include  
12 the scope of the audit, the information gained in the audit, and conclu-  
13 sions and recommendations, with exhibits and appendices;

14 (B) Memoranda and documents analyzing portions or all of an insur-  
15 ance compliance self-audit and discussing potential implementation  
16 issues;

17 (C) An implementation plan that addresses correction of past, current  
18 or future compliance or noncompliance; and

19 (D) Analytic data generated in the course of conducting the insurance  
20 compliance self-audit.

21 (7) "Insurer" shall mean any insurance company as defined in K.S.A.  
22 40-201, and amendments thereto. Insurer also includes any person that  
23 is part of an "insurance holding company system" as defined in K.S.A.  
24 40-3302, and amendments thereto.

25 (8) "Person" shall have the same meaning as defined in K.S.A. 40-  
26 3302, and amendments thereto. Person also includes an agency of the  
27 state of Kansas or any political subdivision thereof.

28 Sec. 2. Except as otherwise expressly provided in this act, an insur-  
29 ance compliance self-audit is privileged and no communication relating  
30 to an insurance compliance self-audit shall be discoverable or admissible  
31 as evidence in any civil, administrative or similar case or proceeding.

32 Sec. 3. If the privilege specified in section 2 applies, no insurer or  
33 person may be examined as to any insurance compliance self-audit, or  
34 any communication pertaining thereto, in any civil, administrative or sim-  
35 ilar case or proceeding.

36 Sec. 4. (a) The provisions of sections 2 and 3, and amendments  
37 thereto, shall not apply to the extent that:

38 (1) The insurer that conducted, or caused to be conducted, the in-  
39 surance compliance self-audit expressly waives the privilege in writing; or

40 (2) the court or hearing officer, in a civil, administrative or similar  
41 case or proceeding, determines that the insurance compliance self-audit  
42 privilege has been asserted for a fraudulent purpose. The court or hearing  
43 officer shall review the communication in camera before making such a

1 determination.

2 (b) In ordering disclosure under this section, the court or hearing  
3 officer shall only compel the disclosure of those communications which  
4 are relevant to the issues in dispute in the pending proceeding. A party  
5 who unsuccessfully opposes disclosure may apply to the court or hearing  
6 officer for an appropriate order protecting the communication from fur-  
7 ther disclosure. There shall be an immediate right of appeal of any order  
8 under this section.

9 (c) An insurer that asserts the insurance compliance self-audit privi-  
10 lege in response to a request for disclosure under this section shall provide  
11 all of the following information with the court or hearing officer at the  
12 time the insurer files any objection to the disclosure:

- 13 (1) The date of the communication;
- 14 (2) the identity of the person conducting the audit;
- 15 (3) the general nature of the activities covered by the insurance com-  
16 pliance self-audit; and
- 17 (4) an identification of the communications for which the privilege is  
18 being asserted.

19 (d) Any party seeking disclosure under paragraph (2) of subsection  
20 (a) shall have the burden of proving that the privilege is being asserted  
21 for a fraudulent purpose.

22 (e) At any time the parties may stipulate to entry of an order deter-  
23 mining whether any specific communication pertaining to an insurance  
24 compliance self-audit is subject to the privilege created by this act.

25 Sec. 5. An insurance compliance self-audit document or communi-  
26 cation that is submitted by a company to the commissioner, or the com-  
27 missioner's designee, in connection with examinations conducted pursu-  
28 ant to K.S.A. 40-2401 et seq., and amendments thereto, shall be afforded  
29 the following additional protections:

- 30 (a) All such communications shall be treated as confidential.
- 31 (b) Disclosure of any communication to the commissioner shall not  
32 constitute a waiver of the privilege. In the event that any communication  
33 is disclosed to a third person, that communication shall be entitled to the  
34 privilege.

35 (c) Any provision of law or rule permitting the commissioner to make  
36 information, records and reports public, shall not apply to any commu-  
37 nication pertaining to an insurance compliance self-audit disclosed to the  
38 commissioner under this section. Any communication disclosed to the  
39 commissioner under this section shall remain the property of the insurer.

40 (d) Once an insurer has notified the commissioner of an insurance  
41 compliance self-audit, either pending or completed, and undertakes rea-  
42 sonable corrective action within 60 days following the completion of the  
43 self-audit, the commissioner may not impose any type of administrative

1 fine, penalty, or other sanction based upon any communication disclosed  
2 to the commissioner. This paragraph shall not apply where:

3 (1) The insurance compliance self-audit has been undertaken; and  
4 (2) the statutory privilege has been asserted for a fraudulent purpose  
5 as determined under paragraph (2) of subsection (a) of section (4).

6 The imposition of any administrative sanction shall be subject to a hear-  
7 ing in accordance with the Kansas administrative procedures act and  
8 amendments thereto.

9 (e) Any communication disclosed to the commissioner under this sec-  
10 tion remains subject to all applicable privileges. Any communication dis-  
11 closed to the commissioner under this section shall not be subject to any  
12 disclosure under any other provision of law.

13 (f) Disclosure of a communication to an agency, whether voluntary,  
14 pursuant to law, or otherwise, shall not constitute a waiver of the privilege  
15 with respect to any other person. To the extent any provision of law shall  
16 permit the commissioner to disclose to another agency any communica-  
17 tion obtained under this section, such disclosure shall not be made with-  
18 out first verifying that the recipient agency agrees and has the legal au-  
19 thority to protect the communication in a manner consistent with this act.  
20 In the case of a criminal law enforcement agency, such communication  
21 shall be made only upon receipt of a duly issued subpoena.

22 Sec. 6. (a) The privilege created by this act shall not extend to any  
23 of the following:

24 (1) Documents, data, reports, or other information required to be  
25 collected, developed, maintained, or reported to an agency pursuant to  
26 state or federal law or order. However, disclosure under sections 4 and  
27 5 of this act, the absence of other factors, shall not make this exception  
28 applicable;

29 (2) information obtained by observation, investigation or monitoring  
30 by any agency; or

31 (3) any communication obtained by examination or investigation au-  
32 thorized by the commissioner, or the commissioner's designee, unless  
33 such communication is obtained in a manner independent from the in-  
34 surance compliance self-audit.

35 Sec. 7. Nothing in this act shall limit, waive, or abrogate the scope  
36 or nature of any privilege existing under statute, rule or common law  
37 including but not limited to, the work product doctrine, the attorney-  
38 client privilege, or the subsequent remedial measures exclusion.

39 Sec. 8. Except as provided in section 6, the commissioner shall main-  
40 tain the confidentiality of information protected under this act. Any dis-  
41 closure by the commissioner, or the commissioner's designee or staff, of  
42 a communication protected under this act, whether inadvertent, willful,  
43 or otherwise, shall not waive the privilege attached to that communica-

1 tion. No person who receives a communication through inadvertent or  
2 improper disclosure under this section shall be permitted to use that  
3 communication in any civil, administrative or similar proceeding, or to  
4 examine any insurer or person in any civil, administrative or similar case  
5 or proceeding as to any insurance compliance self-audit or any commu-  
6 nication pertaining thereto.

7 Sec. 9. This act shall take effect and be in force from and after its  
8 publication in the statute book.

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