

SESSION OF 2005

**CONFERENCE COMMITTEE REPORT BRIEF  
HOUSE BILL NO. 2357**

As Agreed to March 30, 2005

**Brief \***

HB 2357 would enact new law relating to self audits conducted by insurance companies. The bill would make an insurance compliance self-evaluative audit document privileged information and, therefore, not subject to discovery or admissible as evidence in any civil, criminal, or administrative proceeding. Any company, person, or entity performing or directing the compliance audit, officer, employee, or agent involved in the audit, or any consultant hired for that purpose would not be examined in any proceeding related to the audit or audit document. Such document could be voluntarily submitted to the Insurance Commissioner as a confidential document in the course of examination without waiving privilege. Nothing in the Act would prohibit the Division of Legislative Post Audit from access to all insurance compliance self-evaluative audit documents in the Commissioner's custody. Audits, once initiated, would be required to be completed within a reasonable period of time; nothing in the section regarding definitions is to be construed to authorize uninterrupted or continuous auditing.

The privilege would not apply, if a court or administrative tribunal of record in a civil proceeding determines (after a hearing conducted outside of the jury's presence):

- The insurance compliance self-evaluative audit document shows evidence of noncompliance with applicable laws and regulations and appropriate efforts to achieve compliance with such laws and regulations were not promptly initiated and pursued with reasonable diligence upon discovery of noncompliance;

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- to the extent that privilege is expressly waived by the insurance company that prepared or caused to be prepared the insurance compliance self-evaluative document;
- the privilege is asserted for a fraudulent purpose; or
- the material is not subject to the privilege.

The privilege would not apply in a criminal proceeding when a court officer in a criminal proceeding requires disclosure for both reasons cited for the civil proceeding and, also, if the material contains evidence relating to a criminal offense under Kansas insurance law and the following three factors are present:

- the Insurance Commissioner, Attorney General, or county or district attorney has a compelling need for the information;
- the information is not readily available; and
- the Commissioner, Attorney General, or county or district attorney is unable to obtain substantial equivalent information without incurring unreasonable cost or delay.

The bill also provides that privilege, as established in section 1, not be extended to documents, communications, data, reports, or other information collected, developed, maintained, or reported to a regulatory agency and would not affect any other privilege; to information obtained by observation or monitoring by the regulatory agency; and to information obtained from a source independent of the insurance compliance audit.

The bill also would address the procedures for an insurance company to file a request, within 30 days of receipt of notice, for an *in camera* hearing regarding whether the self audit document is subject to disclosure. Failure to request a hearing would waive the privilege for this request only. The court would be required to issue an order scheduling the hearing within 45 days of the petition filing. Under provisions of the act, the court would only be allowed to compel the disclosure of portions of the self-evaluative audit document relevant to the issues in dispute in the proceeding.

Companies asserting the self-evaluative audit privilege would be required to submit, at the time of the filing, to provide the following information to the Commissioner, Attorney General, or county or

district attorney: date of the audit document; identity of the entity conducting the audit; general nature of the activities covered by the audit; and identification of the portions of the audit document for which privilege is being asserted.

The bill also would provide that the insurance company asserting the self-evaluative audit privilege has the burden of demonstration for the applicability of the privilege. The party seeking disclosure would have the burden of proof for assertion of privilege for fraudulent purpose. The bill would further provide that the privilege created by this act apply to all litigation and administrative proceedings pending on the effective date of the act and that no provision of the act or release of the audit document, limit, waive, or abrogate the scope or nature of any statutory or common law privilege.

### **Conference Committee Action**

The Conference Committee agreed to the Senate Committee amendments to the bill and agreed to further amend the definition in the bill for “insurance company” or “insurer” by replacing the statutory reference with KSA 2004 Supp 40-112 and the term “insurer” within the definition with the term, “insurance company.”

### **Background**

The bill was requested by the House Insurance Committee at the request of Representative Carter whose testimony indicated that the effect of the legislation would be a “qualified immunity” for insurers who discover violations of laws and regulations during a self audit, but would not inhibit the authority of the state insurance regulators who are entrusted with protection of insurance consumers. The bill was supported by the American Insurance Association, the Kansas Association of Health Plans, and the State Farm Insurance Companies.

The bill is based on the model act adopted by the National Conference of Insurance Legislators. Similar self-audit provisions for environmental facilities, KSA 2004 Supp 60-3332 *et seq.*, were established in 1995.

The House Committee on Insurance made a technical amendment to the bill in section 3, subsection (d).

The Senate Committee on Financial Institutions and Insurance amended the bill to allow the Division of Legislative Post Audit to access self-evaluative audit documents in the custody of the Commissioner and to expand the limitation on privilege by allowing that material that shows evidence of noncompliance with applicable laws and regulations and related appropriate efforts to achieve compliance not be subject to privilege, as to be determined by the court. The Committee also amended a provision to clarify that documents and other communications submitted to the regulatory agency by striking "expressly required to be" and inserting "shall not affect any other privilege." Finally, the Committee inserted a provision to require that audits be completed within a reasonable time period, and the section relating to definitions, not be construed to authorize uninterrupted or continuous auditing.

The Senate Committee of the Whole amended the provisions for the self-evaluative audit document privileges by clarifying when the privilege would not apply. The court or administrative tribunal would determine in an *in camera* hearing, when the privilege would not apply.

A fiscal note was not available at the time of the committee hearing.