



# House of Representatives

General Assembly

**File No. 200**

February Session, 2000

Substitute House Bill No. 5124

*House of Representatives, March 23, 2000*

The Committee on Insurance and Real Estate reported through REP. AMANN of the 118<sup>th</sup> Dist., Chairperson of the Committee on the part of the House, that the substitute bill ought to pass.

## ***An Act Concerning A Self-Audit Privilege For Insurers.***

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (a) As used in sections 1 to 7, inclusive, of this act:

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

4 (2) "Commissioner" means the Insurance Commissioner of the state  
5 of Connecticut;

6 (3) "Communication" means all oral and written communications  
7 and information relating to an insurance compliance self-audit and  
8 includes an insurance compliance self-audit document;

9 (4) "Hearing officer" means an individual appointed by an agency to  
10 conduct a hearing in an agency proceeding, and includes a staff  
11 employee of the agency;

12 (5) "Insurance compliance self-audit" means a process of voluntary  
13 internal evaluation, review, assessment, or audit not otherwise  
14 expressly required by law of an insurer, of an activity regulated under  
15 the insurance laws or other laws of this or any other state, or federal  
16 law applicable to an insurer, or of management systems related to the  
17 insurer or the regulated activity, which process is designed to identify  
18 and prevent noncompliance or to improve compliance with such  
19 statutes, regulations, bulletins, rules, orders or systems. An insurance  
20 compliance self-audit may be conducted by the insurer, its agents,  
21 officers or employees, or by independent contractors;

22 (6) "Insurance compliance self-audit document" means any  
23 document prepared as a result of, or in connection with an insurance  
24 compliance self-audit. Insurance compliance self-audit document does  
25 not include documents existing prior to the inception of an insurance  
26 compliance self-audit, nor shall the collection of such prior existing  
27 documents in the course of an insurance compliance self-audit subject  
28 such document to the privilege set forth in section 2 of this act. An  
29 insurance compliance self-audit document includes a written response  
30 to the findings of an insurance compliance self-audit, findings,  
31 opinions, conclusions, drafts, memoranda, computer generated or  
32 electronically recorded information and phone records, provided this  
33 information is collected or developed for the primary purpose and in  
34 the course of an insurance compliance self-audit. An insurance  
35 compliance self-audit document also includes any of the following: (A)  
36 A report prepared by an auditor, who may be an agent or employee of  
37 the insurer or an independent contractor, which may include the scope  
38 of the audit, the information gained in the audit, and conclusions and  
39 recommendations, with exhibits and appendices; (B) memoranda and  
40 documents analyzing portions or all of an insurance compliance self-  
41 audit and discussing potential implementation issues; (C) an  
42 implementation plan that addresses correction of past, current or  
43 future compliance or noncompliance; and (D) analytic data generated  
44 in the course of conducting the insurance compliance self-audit;

45 (7) "Insurer" means "insurer" as defined in section 38a-1 of the  
46 general statutes, a "health care center" as defined in section 38a-175 of  
47 the general statutes, and any "person" as defined in section 38a-129 of  
48 the general statutes, that is a part of an "insurance holding company  
49 system" as defined in section 38a-129 of the general statutes;

50 (8) "Person" means "person" as defined in section 38a-1 of the  
51 general statutes and includes an agency.

52 Sec. 2. (NEW) (a) An insurance compliance self-audit shall be  
53 privileged and no communication relating to an insurance compliance  
54 self-audit shall be discoverable or admissible as evidence in any civil,  
55 administrative or similar case or proceeding except as otherwise  
56 expressly provided in sections 1 to 7, inclusive, of this act. The  
57 privilege set forth in this section is a matter of substantive law.

58 (b) If the privilege set forth in subsection (a) of this section applies,  
59 no insurer or person may be examined in any civil, administrative or  
60 similar case or proceeding concerning the insurance compliance self-  
61 audit or any communication pertaining to the audit.

62 Sec. 3. (NEW) (a) The provisions of section 2 of this act shall not  
63 apply:

64 (1) To the extent that the insurer that conducted or caused to be  
65 conducted the insurance compliance self-audit expressly waives the  
66 privilege by so stating its intent in writing; or

67 (2) To the extent that, in a civil, administrative or similar case or  
68 proceeding, the court or hearing officer determines that the insurance  
69 compliance self-audit privilege is inapplicable or asserted for a  
70 fraudulent purpose, provided the court or hearing officer reviews the  
71 communication in camera before making such a determination.

72 (b) In ordering disclosure under this section, the court or hearing  
73 officer shall only compel the disclosure of communications that are

74 relevant to the issues in dispute in the underlying proceeding. A party  
75 unsuccessfully opposing disclosure may apply for an appropriate  
76 order protecting the communication from further disclosure. Any  
77 person aggrieved by an order under this section may appeal to a court  
78 of competent jurisdiction and such appeal shall be privileged in  
79 assignment for hearing.

80 (c) An insurer asserting the insurance compliance self-audit  
81 privilege in response to a request for disclosure under this section shall  
82 provide at the time of filing of any objection to the disclosure all of the  
83 information set forth in subdivisions (1) to (4), inclusive, of this  
84 subsection:

85 (1) The date of the communication;

86 (2) The identity of the person conducting the audit;

87 (3) The general nature of the activities covered by the insurance  
88 compliance self-audit; and

89 (4) An identification of the communications for which the privilege  
90 is being asserted.

91 (d) A party seeking disclosure under subdivision (2) of subsection  
92 (a) of this section shall have the burden of proving that the privilege is  
93 inapplicable or asserted for a fraudulent purpose.

94 (e) The parties may at any time stipulate to entry of an order  
95 directing that specific communications pertaining to an insurance  
96 compliance self-audit are or are not subject to the privilege created by  
97 sections 1 to 7, inclusive, of this act.

98 Sec. 4. (NEW) The privilege set forth in section 2 of this act shall not  
99 impair the authority of the commissioner or the commissioner's  
100 designee to conduct examinations pursuant to chapter 697 of the  
101 general statutes. Regardless of whether a communication is subject to

102 the privilege set forth in section 2 of this act, the commissioner shall  
103 have full authority under chapter 697 of the general statutes to require  
104 disclosure of communications and to examine persons in connection  
105 with the communication, except that:

106 (1) All such communications shall be treated as confidential;

107 (2) Disclosure of any communication to the commissioner shall not  
108 constitute a waiver of the privilege, and if any communication is  
109 disclosed to a third person, that communication shall be entitled to the  
110 privilege;

111 (3) Any provision of law or rule permitting the commissioner to  
112 make information, records and reports public, as well as provisions  
113 permitting the commissioner to exchange information and data with  
114 the National Association of Insurance Commissioners shall not apply  
115 to any communication pertaining to an insurance compliance self-  
116 audit disclosed to the commissioner under this section. Any  
117 communication so disclosed to the commissioner shall remain the  
118 property of the insurer. To the extent the commissioner has the  
119 authority to compel the disclosure of any communication pertaining to  
120 an insurance compliance self-audit under other provisions of  
121 applicable law, any communication so disclosed to the commissioner  
122 may not be disclosed to any other person and shall be accorded the  
123 same confidentiality and other protections as otherwise provided  
124 under sections 1 to 7, inclusive, of this act.

125 (4) The commissioner may not impose any type of administrative  
126 fine or penalty based solely on any communication disclosed to the  
127 commissioner. Prior to imposing any type of fine or administrative  
128 penalty the commissioner shall consider any reasonable corrective  
129 measures undertaken by the insurer.

130 (5) Any communication disclosed to the commissioner under this  
131 section shall remain subject to all applicable privileges existing under

132 statute, common law or rule, such as the work product doctrine,  
133 attorney-client privilege, or the subsequent remedial measures  
134 exclusion. Any communication disclosed to the commissioner under  
135 this section shall not be subject to disclosure under the Freedom of  
136 Information Act.

137 (6) Disclosure of a communication to an agency, whether voluntary  
138 or pursuant to law, shall not constitute a waiver of the privilege with  
139 respect to any other person. To the extent any provision of law permits  
140 the commissioner to disclose to another agency any communication  
141 obtained under this section, such disclosure shall not be made without  
142 first verifying that the recipient agency has the legal authority to  
143 protect the communication consistent with the provisions of sections 1  
144 to 7, inclusive, of this act, and in the case of a criminal law enforcement  
145 agency, shall not be made without a duly issued subpoena.

146 Sec. 5. (NEW) (a) The privilege created by this act shall not extend to  
147 any of the following:

148 (1) Documents, data, reports, or other information required to be  
149 collected, developed, maintained, reported, or otherwise made  
150 available to an agency pursuant to state or federal law or order, except  
151 that any disclosure made under sections 3 or 4 of this act shall not in  
152 and of itself make the exception applicable;

153 (2) Information obtained by observation, investigation or  
154 monitoring by any agency; or

155 (3) Any communication obtained by examination or investigation  
156 authorized by the commissioner, or designee, when such  
157 communication is obtained independently from the insurance  
158 compliance self-audit even if such communication duplicates  
159 information, in whole or in part, contained within the insurance  
160 compliance self-audit.

161       Sec. 6. (NEW) Nothing in sections 1 to 7, inclusive, of this act shall  
162 limit, waive, or abrogate the scope or nature of any privilege existing  
163 under statute, rule or common law including, but not limited to, the  
164 work product doctrine, the attorney-client privilege, or the subsequent  
165 remedial measures exclusion.

166       Sec. 7. (NEW) The commissioner shall maintain the confidentiality  
167 of information protected under sections 1 to 7, inclusive, of this act,  
168 subject to the specific exceptions set forth in section 6 of this act.

169       Sec. 8. This act shall take effect January 1, 2001.

**Statement of Legislative Commissioners:**

In section 4, subsection designators were changed to subdivision designators for consistency.

**INS   Committee Vote:**   Yea   14   Nay   4   JFS

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either House thereof for any purpose:

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**OFA Fiscal Note**

**State Impact:** None

**Affected Agencies:** Department of Insurance

**Municipal Impact:** None

**Explanation**

**State Impact:**

There is no fiscal impact for the Department of Insurance as a result of this bill. The bill creates a privilege for oral and written communications and information relating to an insurance compliance self-audit. It does not impair the authority of the insurance commissioner to conduct an examination into the affairs of an insurer.

**OLR Bill Analysis**

sHB 5124

**AN ACT CONCERNING A SELF-AUDIT PRIVILEGE FOR INSURERS.**

**SUMMARY:**

This bill creates a privilege for oral and written communications and information relating to (1) an insurance compliance self-audit and (2) the insurance compliance self-audit document. The privilege prohibits the discovery or admissibility as evidence of any communications relating to a self-audit in a civil, administrative, or similar case or proceeding. It also prohibits any person or insurer from being examined on such communications in any case or proceeding. The bill creates the privilege as a matter of substantive rather than procedure law, i.e. that part of the law that creates, defines, and regulates the rights, duties, and powers of parties.

The bill specifies that the privilege does not impair the authority of the insurance commissioner or his designee to conduct an examination into the affairs of an insurer, require disclosure of communications and examine someone in connection with the communication, whether or not the communication is privileged. When an examination of an insurer or person is conducted or disclosure required, the bill specifies that it be treated as confidential.

The bill describes the circumstances under which the privilege does not apply. It also specifies particular items of information not covered by the privilege.

Finally, the bill requires the commissioner to keep confidential information protected and specifies that it does not limit, waive, or abrogate the scope or nature of any other privilege granted under existing statute, rule or common law, including the work product doctrine, the attorney-client privilege or the subsequent remedial measures exclusion.

EFFECTIVE DATE: July 1, 2001

**INSURANCE COMPLIANCE SELF-AUDIT**

The bill defines an “insurance compliance self-audit” as a voluntary internal evaluation, review, assessment, or audit of (1) an insurer; (2) an activity regulated under the insurance laws or other laws of this or any other state, or federal law applicable to insurers; or (3) management systems related to the insurer or the regulated activity. The self-audit is designed to identify and prevent noncompliance or improve compliance with statutes, regulations, bulletins, rules, orders, or systems. The self-audit may be conducted by the insurer, its agents, officers or employees; or by an independent contractor.

***Insurance Compliance Self-Audit Document***

The bill defines an “insurance compliance self-audit document” as any document prepared as a result of, or in connection with, a self-audit. A self-audit document includes written responses to the findings of a self-audit, findings, opinions, conclusions, drafts, memoranda, computer-generated or electronically recorded information, and phone records if collected or developed for the primary purpose and in the course of a self-audit. Self-audit documents are also (1) reports prepared by an auditor, who may be an agent or employee of the insurer or an independent contractor, which may include the scope of the audit, information gained in the audit, and conclusions and recommendations, with exhibits and appendices; (2) memoranda and documents analyzing portions of a self-audit and discussing potential implementation issues; (3) an implementation plan that addresses correction of past, current, or future compliance or noncompliance; and (4) analytic data generated in the course of conducting the self-audit.

A self-audit does not include documents existing before the self-audit begins nor does the collection of such prior existing documents in the course of a self-audit subject them to the privilege specified in the bill.

**CIRCUMSTANCES WHEN THE PRIVILEGE DOES NOT APPLY**

The bill specifies that the privilege does not apply in the following

circumstances:

1. to the extent an insurer that conducts or causes a self-audit expressly waives the privilege in writing; or
2. to the extent that, in a civil, administrative or similar case or proceeding, the court or hearing officer determines that the privilege does not apply or is asserted for a fraudulent purpose, so long as the court or hearing officer reviews the communication *in camera* before making such a determination.

### **Court or Administrative Agency-Compelled Disclosure**

In ordering disclosure of the communication, a court or hearing officer can only compel disclosure of communications that are relevant to the issue in dispute. A party unsuccessfully opposing disclosure may apply for an appropriate order protecting the communication from further disclosure. Any person aggrieved by such an order may appeal, and the appeal must be privileged in assignment for hearing.

If an insurer asserts the privilege in response to a request for disclosure by a court or hearing officer, it must, when filing its objections provide the following information:

1. the communication date and the identity of the person conducting the self-audit;
2. the general nature of activities covered by the self-audit; and
3. an identification of the communication for which the privilege is being asserted.

The bill specifies that (1) the party seeking disclosure has the burden of proving that the privilege does not apply or is asserted for a fraudulent purpose and (2) parties may at any time stipulate that specific communications pertaining to a self-audit are or are not subject to the privilege in response to the entry of an order.

### **PARTICULAR ITEMS OF INFORMATION NOT PRIVILEGED**

The bill specifies that the privilege does not extend to any of the following:

1. documents, data, reports, or other information required to be collected, developed, maintained, reported, or otherwise made available to an agency by state or federal law or order;
2. information obtained by observation, investigation, or monitoring by any agency; or
3. any communication obtained by examination or investigation authorized by the commissioner, or his designee, when obtained independently from the self-audit, even if it duplicates information contained within the self-audit.

### **DISCLOSURE TO INSURANCE COMMISSIONER**

When the commissioner invokes his authority and requires disclosure of communications or examines someone in connection with the communication, the bill requires that:

1. all such communications be treated as confidential;
2. disclosure to the commissioner does not constitute waiver of the privilege, and if any communication is disclosed to a third person, that it be entitled to the privilege;
3. any law or rule permitting the commissioner to make information, records, and reports public, or that permits him to exchange information and data with the National Association of Insurance Commissioners, does not apply to any communication pertaining to a self-audit that has been disclosed to him, which must remain the property of the insurer;
4. to the extent the commissioner may compel disclosure of communications pertaining to a self-audit under other legal authority, the disclosure may not be made to others and must be accorded the same protections and confidentiality specified under the bill;
5. the commissioner not impose any administrative fine or penalty based solely on communications disclosed to him, and if he imposes a fine or penalty that he first consider any reasonable corrective measures undertaken by the insurer;
6. any communication disclosed to the commissioner not be subject to the Freedom of Information Act and remain privileged under applicable statute, common law or rule, including the work product doctrine, attorney-client privilege, or the subsequent remedial measures exclusion;

7. any disclosure of communications to an agency, whether voluntary or by law, not constitute a waiver of the privilege with respect to any person, and to the extent that law permits the commissioner to disclose to another agency communications he obtains, such disclosure may not be made without first verifying that the recipient agency has legal authority to protect the communication consistent with the bill; and
8. a criminal law enforcement agency cannot disclose such communications without a duly issued subpoena.

**COMMITTEE ACTION**

Insurance and Real Estate Committee

Joint Favorable Substitute

Yea 14    Nay 4