

House Bill 162 (AS PASSED HOUSE AND SENATE)

By: Representatives Shaw of the 176<sup>th</sup>, Efstration of the 104<sup>th</sup>, Taylor of the 173<sup>rd</sup>, Lumsden of the 12<sup>th</sup>, and Maxwell of the 17<sup>th</sup>

A BILL TO BE ENTITLED  
AN ACT

1 To amend Chapter 2 of Title 33 of the Official Code of Georgia Annotated, relating to the  
2 department and Commissioner of Insurance, so as to provide for insurance compliance  
3 self-evaluative privilege; to provide for intent; to provide for definitions; to provide for an  
4 insurance compliance self-evaluative audit document as privileged information; to provide  
5 for inadmissibility in certain legal actions; to provide for applications and exceptions; to  
6 provide for the burden of proof; to provide for applicability; to provide for related matters;  
7 to repeal conflicting laws; and for other purposes.

8 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

9 **SECTION 1.**

10 Chapter 2 of Title 33 of the Official Code of Georgia Annotated, relating to the department  
11 and Commissioner of Insurance, is amended by adding a new Code section to read as  
12 follows:

13 "33-2-34.

14 (a) To encourage insurance companies and persons conducting activities regulated under  
15 this title, both to conduct voluntary internal audits of their compliance programs and  
16 management systems and to assess and improve compliance with state and federal statutes,  
17 rules, and orders, an insurance compliance self-evaluative privilege is recognized to protect  
18 the confidentiality of communications relating to voluntary internal compliance audits.  
19 The General Assembly hereby finds and declares that protection of insurance consumers  
20 is enhanced by companies' voluntary compliance with this state's insurance and other laws  
21 and that the public will benefit from incentives to identify and remedy insurance and other  
22 compliance issues. It is further declared that limited expansion of the protection against  
23 disclosure will encourage voluntary compliance and improve insurance market conduct  
24 quality and that the voluntary provisions of this Code section will not inhibit the exercise  
25 of the regulatory authority by those entrusted with protecting insurance consumers.

26 (b) As used in this Code section, the term:

27 (1) 'Insurance compliance audit' means a voluntary, internal evaluation, review,  
 28 assessment, or audit not otherwise expressly required by law of an insurer or an activity  
 29 regulated under this title, or other state or federal law applicable to an insurer, or of  
 30 management systems related to the insurer or activity, that is designed to identify and  
 31 prevent noncompliance and to improve compliance with those statutes, rules, or orders.  
 32 An insurance compliance audit may be conducted by the insurer, its employees, or  
 33 independent contractors.

34 (2) 'Insurance compliance self-evaluative audit document' means any document prepared  
 35 as a result of or in connection with and not prior to an insurance compliance audit. An  
 36 insurance compliance self-evaluative audit document may include a written response to  
 37 the findings of an insurance compliance audit. An insurance compliance self-evaluative  
 38 audit document may include, but is not limited to, as applicable, field notes and records  
 39 of observations, findings, opinions, suggestions, conclusions, drafts, memoranda,  
 40 drawings, photographs, computer generated or electronically recorded information, phone  
 41 records, maps, charts, graphs, and surveys, provided that this supporting information is  
 42 collected or developed for the primary purpose and in the course of an insurance  
 43 compliance audit. An insurance compliance self-evaluative audit document may also  
 44 include any of the following:

45 (A) An insurance compliance audit report prepared by an auditor, who may be an  
 46 employee of the insurer or an independent contractor, which may include the scope of  
 47 the audit, the information gained in the audit, and conclusions and recommendations,  
 48 with exhibits and appendices;

49 (B) Memoranda and documents analyzing portions or all of the insurance compliance  
 50 audit report and discussing potential implementation issues;

51 (C) An implementation plan that addresses correcting past noncompliance, improving  
 52 current compliance, and preventing future noncompliance; or

53 (D) Analytic data generated in the course of conducting the insurance compliance  
 54 audit.

55 (c)(1) An insurance compliance self-evaluative audit document is privileged information  
 56 and is not admissible as evidence in any legal action in any civil, criminal, or  
 57 administrative proceeding, except as provided in subsections (d) and (e) of this Code  
 58 section. Documents, communications, data, reports, or other information created as a  
 59 result of a claim involving personal injury or workers' compensation made against an  
 60 insurance policy are not insurance compliance self-evaluative audit documents and are  
 61 admissible as evidence in civil proceedings as otherwise provided by applicable rules of  
 62 evidence or civil procedure, subject to any applicable statutory or common law privilege,

63 including, but not limited to, the work product doctrine, the attorney-client privilege, or  
64 the subsequent remedial measures exclusion.

65 (2) If any insurer, person, or entity performs or directs the performance of an insurance  
66 compliance audit, an officer or employee involved with the insurance compliance audit,  
67 or any consultant who is hired for the purpose of performing the insurance compliance  
68 audit, shall not be examined in any civil, criminal, or administrative proceeding as to the  
69 insurance compliance audit or any insurance compliance self-evaluative audit document,  
70 as defined in this Code section. This paragraph shall not apply if the privilege set forth  
71 in paragraph (1) of this subsection is determined under subsection (d) or (e) of this Code  
72 section not to apply.

73 (3) An insurer may voluntarily submit, in connection with examinations conducted under  
74 this Code section, an insurance compliance self-evaluative audit document to the  
75 Commissioner, or his or her designee, as a confidential document under subsection (g)  
76 of Code Section 33-2-14 without waiving the privilege set forth in this Code section to  
77 which the insurer would otherwise be entitled. However, the provision permitting the  
78 Commissioner to provide access to the National Association of Insurance Commissioners  
79 shall not apply to the insurance compliance self-evaluative audit document so voluntarily  
80 submitted. Nothing contained in this subsection shall give the Commissioner any  
81 authority to compel an insurer to disclose involuntarily or otherwise provide an insurance  
82 compliance self-evaluative audit document.

83 (d)(1) The privilege set forth in subsection (c) of this Code section shall not apply to the  
84 extent that it is expressly waived by the insurer that prepared or caused to be prepared the  
85 insurance compliance self-evaluative audit document.

86 (2) In a civil or administrative proceeding, a court of record may, after an in camera  
87 review, require disclosure of material for which the privilege set forth in subsection (c)  
88 of this Code section is asserted, if the court determines that:

89 (A) The privilege is asserted for a fraudulent purpose;

90 (B) The material is not subject to the privilege; or

91 (C) Even if subject to the privilege, the material shows evidence of noncompliance  
92 with state or federal statutes, rules, and orders and the insurer failed to undertake  
93 reasonable corrective action or eliminate the noncompliance within a reasonable time.

94 (3) In a criminal proceeding, a court of record may, after an in camera review, require  
95 disclosure of material for which the privilege described in subsection (c) of this Code  
96 section is asserted, if the court determines that:

97 (A) The privilege is asserted for a fraudulent purpose;

98 (B) The material is not subject to the privilege;

99 (C) Even if subject to the privilege, the material shows evidence of noncompliance  
 100 with state or federal statutes, rules, and orders and the insurer failed to undertake  
 101 reasonable corrective action or eliminate such noncompliance within a reasonable time;  
 102 or

103 (D) The material contains evidence relevant to the commission of a criminal offense  
 104 under this title and:

105 (i) The Commissioner has a compelling need for the information;

106 (ii) The information is not otherwise available; and

107 (iii) The Commissioner is unable to obtain the substantial equivalent of the  
 108 information by any means without incurring unreasonable cost and delay.

109 (e)(1) Within 30 days after the Commissioner makes a written request by certified mail  
 110 for disclosure of an insurance compliance self-evaluative audit document under this  
 111 subsection, the insurer that prepared or caused the document to be prepared may file with  
 112 the appropriate court a petition requesting an in camera hearing on whether the insurance  
 113 compliance self-evaluative audit document or portions of the document are privileged  
 114 under this Code section or subject to disclosure. The court has jurisdiction over a petition  
 115 filed by an insurer under this subsection requesting an in camera hearing on whether the  
 116 insurance compliance self-evaluative audit document or portions of the document are  
 117 privileged or subject to disclosure. Failure by the insurer to file a petition waives the  
 118 privilege.

119 (2) An insurer asserting the insurance compliance self-evaluative privilege in response  
 120 to a request for disclosure under this subsection shall include in its petition for an in  
 121 camera hearing all of the information set forth in paragraph (5) of this subsection.

122 (3) Upon the filing of a petition under this subsection, the court shall issue an order  
 123 scheduling, within 45 days after the filing of the petition, an in camera hearing to  
 124 determine whether the insurance compliance self-evaluative audit document or portions  
 125 of the document are privileged under this Code section or subject to disclosure.

126 (4) The court, after an in camera review, may require disclosure of material for which  
 127 the privilege in subsection (c) of this Code section is asserted if the court determines,  
 128 based upon its in camera review, that any one of the conditions set forth in paragraph (2)  
 129 of subsection (d) of this Code section is applicable as to a civil or administrative  
 130 proceeding or that any one of the conditions set forth in paragraph (3) of subsection (d)  
 131 of this Code section is applicable as to a criminal proceeding. Upon making such a  
 132 determination, the court may only compel the disclosure of those portions of an insurance  
 133 compliance self-evaluative audit document relevant to issues in dispute in the underlying  
 134 proceeding. Any compelled disclosure will not be considered to be a public document  
 135 or be deemed to be a waiver of the privilege for any other civil, criminal, or

136 administrative proceeding. A party unsuccessfully opposing disclosure may apply to the  
137 court for an appropriate order protecting the document from further disclosure.  
138 (5) An insurer asserting the insurance compliance self-evaluative privilege in response  
139 to a request for disclosure under this subsection shall provide to the Commissioner at the  
140 time of filing any objection to the disclosure:

- 141 (A) The date of the insurance compliance self-evaluative audit document;
- 142 (B) The identity of the entity conducting the audit;
- 143 (C) The general nature of the activities covered by the insurance compliance audit; and
- 144 (D) An identification of the portions of the insurance compliance self-evaluative audit  
145 document for which the privilege is being asserted.

146 (f)(1) An insurer asserting the insurance compliance self-evaluative privilege set forth  
147 in subsection (c) of this Code section has the burden of demonstrating the applicability  
148 of the privilege. Once an insurer has established the applicability of the privilege, a party  
149 seeking disclosure under paragraph (2) or (3) of subsection (d) of this Code section has  
150 the burden of proving that the privilege is asserted for a fraudulent purpose or that the  
151 insurer failed to undertake reasonable corrective action or eliminate the noncompliance  
152 within a reasonable time. The Commissioner, in seeking disclosure under paragraph (3)  
153 of subsection (d) of this Code section, has the burden of proving the elements set forth  
154 in paragraph (3) of subsection (d) of this Code section.

155 (2) The parties may at any time stipulate in proceedings under subsection (d) or (e) of  
156 this Code section to entry of an order directing that specific information contained in an  
157 insurance compliance self-evaluative audit document is or is not subject to the privilege  
158 provided under subsection (c) of this Code section.

159 (g) The privilege set forth in subsection (c) of this Code section shall not extend to:

- 160 (1) Documents, communications, data, reports, or other information required to be  
161 collected, developed, maintained, reported, or otherwise made available to a regulatory  
162 agency pursuant to this title or other federal or state law, rule, or order;
- 163 (2) Information obtained by observation or monitoring by any regulatory agency; or
- 164 (3) Information obtained from a source independent of the insurance compliance audit.

165 (h) Nothing in this Code section shall limit, waive, or abrogate the scope or nature of any  
166 statutory or common law privilege including, but not limited to, the work product doctrine,  
167 the attorney-client privilege, or the subsequent remedial measures exclusion.

168 (i) This Code section shall apply to self-evaluative audits completed before June 30, 2018,  
169 but shall not apply to any such audits completed on or after July 1, 2018, unless authorized  
170 by the General Assembly prior to that date."

171

**SECTION 2.**

172 All laws and parts of laws in conflict with this Act are repealed.