

The House Committee on Insurance offers the following substitute to HB 162:

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 and 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 and 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.