ACT 227

H.B. NO. 90

A Bill for an Act Relating to Insurance.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 431, Hawaii Revised Statutes, is amended by adding a new article to be appropriately designated and to read as follows:

"ARTICLE
MARKET CONDUCT

§431: -1 Legislative intent. The purpose of this article is to establish a framework for insurance division market conduct actions, including:

(1) Processes and systems for identifying, assessing, and prioritizing market conduct problems that have a substantial adverse impact on consumers, policyholders, and claimants;
(2) Market conduct actions by the commissioner to substantiate those market conduct problems and a means to remedy significant market conduct problems; and
(3) Procedures to communicate and coordinate market conduct actions among states to foster the most efficient and effective use of resources.

§431: -2 Definitions. As used in this article, unless the context indicates otherwise:

"Commissioner" means the insurance commissioner of the State of Hawaii.

"Complaint" means a written or documented oral communication to the insurance division primarily expressing a grievance, meaning an expression of dissatisfaction. For health companies, a grievance is a written complaint submitted by or on behalf of a covered person.

"Comprehensive market conduct examination" means a review of one or more lines of business of an insurer domiciled in this State that is not conducted for cause. The term includes a review of rating, tier classification, underwriting, policyholder service, claims, marketing and sales, producer licensing, complaint handling practices, and compliance procedures and policies.

"Insurance compliance audit" means a voluntary, internal evaluation, review, assessment, audit, or investigation for the purpose of identifying or preventing noncompliance with, or promoting compliance with laws, regulations, orders, or industry or professional standards, which is conducted by or on behalf of an insurer, or which involves an insurer activity regulated by the commissioner.

"Insurance compliance self-evaluative audit document" means documents prepared as a result of or in connection with an insurance compliance audit. An insurance compliance self-evaluative audit document may include a written response to the findings of an insurance compliance audit. An insurance compliance self-evaluative audit document may include, but is not limited to, as applicable, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits, computer generated or electronically recorded information, telephone records, maps, charts, graphs, and surveys; provided that this supporting information is collected or developed for the primary purpose and in the course of an insurance compliance audit.

"Market analysis" means a process whereby market conduct surveillance personnel collect and analyze information from filed schedules, surveys, required reports, and other sources to develop a baseline and to identify patterns or practices of insurers licensed to do business in this State that deviate significantly from the norm or that may pose a potential risk to the insurance consumer.

"Market conduct action" means any of the full range of activities that the commissioner may initiate to assess the market and practices of individual insurers, beginning with market analyses and extending to targeted examinations. The commissioner's activities to resolve an individual consumer complaint or other reports of a specific instance of misconduct are not market conduct actions for purposes of this article.

"Market conduct examination" means the examination of the insurance operations of an insurer licensed to do business in this State to evaluate compliance with the applicable laws and rules of this State. A market conduct examination may be either a comprehensive examination or a targeted examination. A market conduct examination is separate and distinct from a financial examination of an insurer performed pursuant to article 5, but may be conducted at the same time.

"Market conduct surveillance personnel" means those individuals employed or contracted by the commissioner to collect, analyze, review, or act on information about the insurance marketplace, which identifies patterns or practices of insurers.

"National Association of Insurance Commissioners" means the organization of insurance regulators from the fifty states, the District of Columbia, and the four United States territories.

"Qualified contract examiner" means a person under contract to the commissioner, who is qualified by education, experience and, where applicable, professional designations, to perform market conduct actions.

"Targeted examination" means a focused examination conducted for cause, based on the results of market analysis indicating the need to review either a specific line of business or specific business practices, including but not limited to underwriting and rating, marketing and sales, complaint handling operations, advertising materials, licensing, policyholder services, non-forfeitures, claims handling, or policy forms and filings. A targeted examination may be conducted by desk examination or by an on-site examination.

"Third party model or product" means a model or product provided by an entity separate from and not under direct or indirect corporate control of the insurer using the model or product.

§431: -3 Domestic responsibility and deference to other states. (a) The commissioner shall be responsible for conducting market conduct examinations for policyholder protection, which shall be accomplished by comprehensive or targeted examinations of domestic insurers or the affiliates of domestic insurers and targeted examinations of foreign insurers or the affiliates of foreign insurers as deemed necessary by the commissioner, based on the results of market analysis. The commissioner may delegate responsibility for conducting an examination of a domestic insurer, foreign insurer, or an affiliate of an insurer to the insurance commissioner of another state if that state's insurance commissioner agrees to accept the delegated responsibility for the examination.

(b) The commissioner may delegate responsibility to an insurance commissioner of a state in which the domestic insurer, foreign insurer, or affiliate has a significant number of policies or significant premium volume, as determined by the commissioner by rule.

(c) If the commissioner elects to delegate responsibility for examining an insurer, the commissioner shall accept a report of the examination prepared by the commissioner to whom the responsibility has been delegated.

(d) In lieu of conducting a market conduct examination of an insurer, the commissioner shall accept a report of a market conduct examination on the insurer prepared by the insurance commissioner of the insurer's state of domicile or another state; provided:

(1) The laws of that state applicable to the subject of the examination are deemed by the commissioner to be substantially similar to those of this State;

(2) The examining state has a market conduct surveillance system that the commissioner deems comparable to the market conduct surveillance system required under this article; and

(3) The examination from the other state's insurance commissioner has been conducted within the past three years.

(e) If the insurance commissioner to whom the examination responsibility was delegated pursuant to subsection (a) or the report of a market conduct examination prepared by the insurance commissioner of another state pursuant to subsection (d), did not evaluate the specific area or issue of concern to the commissioner, the commissioner may pursue a targeted examination or market analysis of the unexamined area pursuant to this article.

(f) The commissioner's determination under subsection (d) is discretionary and is not subject to appeal.

(g) Subject to a determination under subsection (d), if a market conduct examination conducted by another state results in a finding that an insurer should modify a specific practice or procedure, the commissioner shall accept documentation that the insurer has made a similar modification in this State, in lieu of initiating a market conduct action or examination related to that practice or procedure. The commissioner may require other or additional practice or procedure modifications as are necessary to achieve compliance with specific state laws or regulations, which differ substantially from those of the state that conducted the examination.

§431: -4 Market analysis procedures. (a) The commissioner shall gather information from data currently available to the insurance division, as well as surveys and required reporting requirements, information collected by the National Association of Insurance Commissioners and a variety of other sources in both the public and private sectors, information from within and outside the insurance industry from objective sources, information from websites for insurers, agents, and other organizations, and information from other sources; provided that prior to use, the sources are published at least annually in a bulletin or circular.

The information shall be analyzed to develop a baseline understanding of the marketplace and to identify for further review insurers or practices that deviate significantly from the norm or that may pose a potential risk to the insurance consumer. The commissioner shall use procedures that are substantially similar to the National Association of Insurance Commissioners' guidelines on market analysis as one resource in performing this analysis.

The commissioner shall use the following policies and procedures in performing the analysis required under this section:

(1) Identify key lines of business for systematic review; and

(2) Identify companies for further analysis based on available information.

(b) If the analysis compels the commissioner to inquire further into a particular insurer or practice, the following continuum of market conduct actions may be considered prior to conducting a targeted, on-site market conduct examination. The action selected shall be made known to the insurer in writing. These actions may include but are not limited to:

(1) Correspondence with the insurer;

(2) Insurer interviews;

(3) Information gathering;

(4) Policy and procedure reviews;

(5) Interrogatories; and

(6) Review of insurer self-evaluation and compliance programs, including membership in an organization such as a best-practice organization that has as its central mission the promotion of high ethical standards in the marketplace.

(c) The commissioner shall select a market conduct action that is cost-effective for the insurance division and the insurer, while still protecting the insurance consumer.

(d) The commissioner shall take those steps reasonably necessary to:

(1) Eliminate requests for information that duplicate:

(A) Information provided as part of an insurer's annual financial statement, the annual market conduct statement of the National Association of Insurance Commissioners, or other required schedules, surveys, or reports that are regularly submitted to the commissioner; or

(B) Data requests made by other states if that information is available to the commissioner, unless the information is state-specific; and

(2) Coordinate market conduct actions and findings with other states.

§431: -5 Protocols for market conduct actions. (a) Market conduct actions taken as a result of a market analysis shall focus on the general business practices and compliance activities of insurers, rather than identifying infrequent or unintentional random errors that do not cause consumer harm.

(b) The commissioner may determine the frequency and timing of such market conduct actions. The timing shall depend upon the specific market conduct action to be initiated, unless extraordinary circumstances indicating a risk to consumers require immediate action.

If the commissioner has information that more than one insurer is engaged in common practices that may violate the law, the commissioner may schedule and coordinate multiple examinations simultaneously.

(c) The insurer shall be notified of any practice or procedure which is to be the subject of a market conduct action and shall be given an opportunity to resolve such matters that arise as a result of a market analysis to the satisfaction of the commissioner before any additional market conduct actions are taken against the insurer. If the insurer has modified the practice or procedure as a result of a market

conduct action taken by the insurance commissioner of another state, the commissioner shall accept appropriate documentation that the insurer has satisfactorily modified the practice or procedure and made similar modification to such practice or procedure in this State.

§431: -6 Protocols for market conduct examinations. (a) When market analysis identifies a pattern of conduct or practice by an insurer which requires further investigation, and less intrusive market conduct actions identified in section 431: -4(b) are not appropriate, the commissioner has the discretion to conduct targeted market conduct examinations in accordance with procedures that are substantially similar to the National Association of Insurance Commissioners' guidelines on market conduct examination procedures.

(b) Causes or conditions, if identified through market analysis, that may trigger a targeted examination, are:

(1) Information obtained from a market conduct annual statement, market survey, or report of financial examination indicating potential fraud, that the insurer is conducting the business of insurance without a license or is engaged in a potential pattern of unfair trade practice in violation of article 13;

(2) A number of complaints against the insurer or a complaint ratio sufficient to indicate potential fraud, conducting the business of insurance without a license, or a potential pattern of unfair trade practice in violation of article 13. For the purposes of this section, a complaint ratio shall be determined for each line of business;

(3) Information obtained from other objective sources, such as published advertising materials indicating potential fraud, conducting the business of insurance without a license, or evidencing a potential pattern of unfair trade practice in violation of article 13; or

(4) Patterns of violations of this chapter and the rules adopted thereunder regarding rate filings, form filings, and termination requirements.

(c) If the insurer to be examined is not a domestic insurer, the commissioner shall communicate with and may coordinate the examination with the insurance commissioner of the state in which the insurer is organized.

(d) Concomitant with the notification requirements established in subsection (f), the commissioner shall post notification on the National Association of Insurance Commissioners' examination tracking system, or comparable product as determined by the commissioner, that a market conduct examination has been scheduled.

(e) Prior to commencement of a targeted on-site market conduct examination, market conduct surveillance personnel shall prepare a work plan and proposed budget. The proposed budget, which shall be reasonable for the scope of the examination, and work plan, shall be provided to the insurer under examination. Market conduct examinations, to the extent feasible, shall use desk examinations and data requests prior to a targeted on-site examination.

Market conduct examinations shall be conducted in accordance with procedures that are substantially similar to the National Association of Insurance Commissioners' guidelines on market conduct examination procedures.

Prior to the conclusion of a market conduct examination, the individual among the market conduct surveillance personnel who is designated as the examiner-in-charge shall schedule an exit conference with the insurer.

(f) Announcement of the examination shall be sent to the insurer and posted on the National Association of Insurance Commissioners' examination tracking system or comparable product, as determined by the commissioner, as soon as possible but not later than sixty days before the estimated commencement of the examination. The announcement shall contain:

(1) The name and address of the insurer being examined;
(2) The name and contact information of the examiner-in-charge;
(3) The reason for and the scope of the targeted examination;
(4) The date the examination is scheduled to begin;
(5) Identification of any non-insurance department personnel who will assist in the examination, if known at the time the notice is prepared;
(6) A time estimate for the examination;
(7) A budget and work plan for the examination and identification of reasonable and necessary costs and fees that will be included in the bill, if the cost of the examination is billed to the insurer; and
(8) A request for the insurer to name its examination coordinator.

(g) If a targeted examination is expanded beyond the reasons provided to the insurer in the notice of the examination required under this section, the commissioner shall provide written notice to the insurer, explaining the extent of the expansion and the reasons for the expansion. The commissioner shall provide a revised work plan to the insurer before the beginning of any significantly expanded examination, unless extraordinary circumstances indicating a risk to consumers require immediate action.

(h) The commissioner shall conduct a pre-examination conference with the insurer examination coordinator and key personnel to clarify expectations thirty days prior to commencement of the examination.

(i) In requesting the information, the commissioner shall use the National Association of Insurance Commissioners' standard data request or comparable product.

An insurer responding to a commissioner's request to produce information shall produce it as it is kept in the usual course of business or shall organize and label it to correspond with the categories in the request.

If a commissioner's request does not specify the form or forms for producing electronically stored information, an insurer responding to the request shall produce the information in a form or forms in which the insurer ordinarily maintains it or in a form or forms that are reasonably usable.

An insurer responding to an information request need not produce the same electronically stored information in more than one form.

An insurer responding to an information request need not provide the electronically stored information from sources that the company identifies as not reasonably accessible because of undue burden or cost.

(j) The commissioner shall adhere to the following timeline, unless a mutual agreement is reached with the insurer to modify the timeline:

(1) The commissioner shall deliver the draft report to the insurer within sixty days of the completion of the examination. Completion of the examination shall be defined as the date the commissioner confirms in writing that the examination is completed;
(2) The insurer shall respond with written comments within thirty days of receipt of the draft report;
(3) The commissioner shall make a good faith effort to resolve issues and prepare a final report within thirty days of receipt of the insurer's written comments, unless a mutual agreement is reached to extend the deadline. The commissioner may make corrections and other changes, as appropriate; and
(4) The insurer, within thirty days, shall accept the final report, accept the findings of the report, file written comments, or request a hearing. An additional thirty days shall be allowed if agreed to by the commissioner and the insurer. Any such hearing request shall be made in writing and shall follow chapter 91.

The final written and electronic market conduct report shall include the insurer's written response and any agreed-to corrections or changes. The response may be included either as an appendix or in the text of the examination report. The insurer shall not be obligated to submit a response. References to specific individuals by name shall be limited to an acknowledgement of their involvement in the conduct of the examination.

(k) Upon adoption of the examination report pursuant to subsection (j), the commissioner shall continue to hold the content of the examination report as private and confidential for a period of thirty days, except as provided in this subsection. During this time, the report shall not be subject to subpoena and shall not be subject to discovery or admissible as evidence in any private action; provided that no court of competent jurisdiction has ordered production. Thereafter, the commissioner shall open the report for public inspection; provided no court of competent jurisdiction has stayed its publication. This section shall not be construed to limit the commissioner's authority to use any final or preliminary market conduct examination report, and examiner or insurer work papers or other documents, or any other information discovered or developed during the course of an examination in the furtherance of any legal or regulatory action that the commissioner, in the commissioner's sole discretion, may deem appropriate.

Nothing contained in this article shall prevent or be construed as preventing the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the insurance division of this or any other state or agency of the federal government at any time; provided that the agency or office receiving the report or matters relating thereto agrees to hold it confidential and in a manner consistent with this article.

(l) Where the reasonable and necessary cost and fees of a market conduct examination are to be assessed against the insurer under examination, the costs and fees shall be consistent with that otherwise authorized by law. Costs and fees shall be itemized and bills shall be provided to the insurer on a monthly basis for review prior to submission for payment.

The commissioner shall maintain active management and oversight of examination costs and fees, including costs and fees associated with the use of insurance division personnel and examiners and with retaining qualified contract examiners necessary to perform an examination. To the extent the commissioner retains outside assistance, the commissioner shall have written protocols that:

(1) Clearly identify the types of functions subject to outsourcing;
(2) Provide specific timelines for completion of the outsourced review;
(3) Require disclosure of contract examiners' recommendations;
(4) Establish and use a dispute resolution or arbitration mechanism to resolve conflicts with insurers regarding examination costs and fees; and
(5) Require disclosure of the terms of the contracts with the outside consultants that will be used, specifically the costs and fees or hourly rates, or both, that can be charged.

The commissioner shall review and affirmatively endorse detailed billings from the qualified contract examiner before the detailed billings are sent to the insurer.

The commissioner may contract in accordance with applicable state contracting procedures, for qualified contract actuaries and examiners as the commissioner deems necessary; provided that the compensation and per diem allowances paid to the contract persons shall not exceed one hundred twenty-five per cent of the compensation and per diem allowances for examiners set forth in the guidelines adopted by the National Association of Insurance Commissioners, unless the com-

missioner demonstrates that one hundred twenty-five per cent is inadequate under the circumstances of the examination.

(m) The commissioner may not conduct a comprehensive market conduct examination more frequently than once every three years. The commissioner may waive conducting a comprehensive market conduct examination based on market analysis.

§431: -7 Confidentiality requirements. (a) Except as otherwise provided by law, market conduct surveillance personnel shall have free and full access to all books and records, employees, officers, and directors, as practicable, of the insurer during regular business hours. An insurer using a third-party model or product for any of the activities under examination shall provide, upon the request of market conduct surveillance personnel, the details of those models or products to those personnel. All documents, whether from a third party or an insurer, including but not limited to working papers, third-party models or products, complaint logs, and copies thereof, created, produced, or obtained by or disclosed to the commissioner or any other person in the course of any market conduct actions made pursuant to this article, or in the course of market analysis by the commissioner of the market conditions of an insurer, or obtained by the National Association of Insurance Commissioners as a result of any of the provisions of this article, shall be confidential by law and privileged, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.

(b) No waiver of any applicable privilege or claim of confidentiality in the documents, materials, or information shall occur as a result of disclosure to the commissioner under this section.

(c) Market conduct surveillance personnel shall be vested with the power to issue subpoenas and examine insurer personnel under oath when such action is ordered by the commissioner.

(d) Notwithstanding any other law to the contrary, the commissioner may:

(1) Share documents, materials, or other information, including confidential and privileged documents, materials, or information subject to subsection (a), with other state, federal, and international regulatory agencies, law enforcement authorities, and the National Association of Insurance Commissioners and its affiliates and subsidiaries; provided that the recipient agrees to and has the legal authority to maintain the confidentiality and privileged status of the documents, materials, communications, or other information;

(2) Receive documents, materials, communications, or information, including otherwise confidential and privileged documents, materials, or information, from the National Association of Insurance Commissioners and its affiliates or subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information; and

(3) Enter into agreements governing the sharing and use of information consistent with this subsection.

(e) No insurer shall be compelled to disclose an insurance compliance self-evaluative audit document or waive any statutory or common law privilege, but may voluntarily disclose such document to the commissioner in response to any market analysis, market conduct action, or examination as provided in this article.

(f) To encourage insurance companies and persons conducting activities regulated under this code, both to conduct voluntary internal audits of their compli-

ance programs and management systems and to access and improve compliance with State and federal statutes, rules, and orders, an insurance compliance self-evaluative privilege is recognized to protect the confidentiality of communication relating to voluntary internal compliance with this State's insurance and other laws and that the public will benefit from incentives to identify and remedy insurance and other compliance problems. It is further declared that limited expansion of the protection against disclosure will encourage voluntary compliance and improve insurance market conduct quality and that the voluntary provisions of this section will not inhibit the exercise of the regulatory authority by those entrusted with protecting insurance consumers.

(g)(1) Except as provided in subsections (h) and (i), an insurance compliance self-evaluative audit is privileged information and is not discoverable or admissible as evidence in any legal action in any civil, criminal, or administrative proceeding. The privilege created herein is a matter of substantive law of this State and is not merely a procedural matter governing civil or criminal procedures in the courts of this State;

(2) If any company, person, or entity performs or directs the performance of an insurance compliance audit, an officer, employee or agent involved with the insurance audit, or any consultant who is hired for the purpose of performing the insurance compliance audit may not be examined in any civil, criminal, or administrative proceeding as to the insurance compliance audit or any insurance compliance self-evaluative audit document, as defined in this section. This subsection does not apply if the privilege set forth in subsection (g)(1) of this section is determined under subsection (h) or (i) not to apply;

(3) A company may voluntarily submit, in connection with examinations conducted under this article, an insurance compliance self-evaluative audit document to the commissioner or the commissioner's designee, as a confidential document under this section without waiving the privilege set forth in this section to which the company would otherwise be entitled; provided, however, that the provisions in this section permitting the commissioner to make confidential documents public pursuant to this section and access to the National Association of Insurance Commissioners shall not apply to the insurance compliance self-evaluative audit document under other provisions of applicable law, any such report furnished to the commissioner shall not be provided to any other persons or entitles[1] and shall be accorded the same confidentiality and other protections as provided above for voluntarily submitted documents. Any use of an insurance compliance self-evaluative audit document furnished as a result of the inappropriate treatment of customers has been remedied or that an appropriate plan for their remedy is in place.

A company's insurance compliance self-evaluative audit document submitted to the commissioner shall remain subject to all applicable statutory or common law privileges including, but not limited to, the work product doctrine, attorney-client privilege, or the subsequent remedial measures exclusion.

Any compliance self-evaluative audit document so submitted and in the possession of the commissioner shall remain the property of the company and shall not be subject to any disclosure or production under chapter 92;

(4) Disclosure of an insurance compliance self-evaluative audit document to a governmental agency, whether voluntary or pursuant to compulsion of law, shall not constitute a waiver of the privilege set forth in

subsection (g)(1) with respect to any other persons or any other governmental agencies;

(h)(1) The privilege set forth in subsection (g) does not apply to the extent that it is expressly waived by the company that prepared or caused to be prepared the insurance compliance self-evaluative audit document;

(2) In a civil or administrative proceeding, a court of record, after an in camera review, may require disclosure of material for which the privilege set forth in subsection (g) is asserted, if the court determines one of the following:

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

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

(3) In a criminal proceeding, a court of record, after an in camera review, may require disclosure of material for which the privilege described in subsection (g) is asserted, if the court determines one of the following:

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

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

(C) The material contains evidence relevant to commission of a criminal offense under this code, and all three of the following factors are present:

(i) The commissioner or attorney general has a compelling need for the information; and

(ii) The information is not otherwise available; and

(iii) The commissioner or attorney general is unable to obtain the substantial equivalent of the information by any other means without incurring unreasonable cost and delay.

(i)(1) Within thirty days after the commissioner or attorney general serves on an insurer a written request by certified mail for disclosure of an insurance compliance self-evaluative audit document under this subsection, the company that prepared or caused the document to be prepared may file with the appropriate court a petition requesting an in camera hearing on whether the insurance compliance self-evaluative audit document or portions of the document are privileged or subject to disclosure. Failure by the company to file a petition waives the privilege for this request only;

(2) A company asserting the insurance compliance self-evaluative privilege in response to a request for disclosure under this subsection shall include in its request for an in camera hearing all of the information set forth in subsection (i)(5);

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

(4) The court, after an in camera review, may require disclosure of material for which the privilege in subsection (g) is asserted if the court determines, based upon its in camera review, that any one of the conditions set forth in subsection (h)(2)(A) and (B) is applicable as to a civil or administrative proceeding or that any one of the conditions set forth in subsection (h)(3)(A) through (C) is applicable as to a criminal proceeding. Upon making such a determination, the court may only compel the disclosure of those portions of an insurance compliance self-evaluative audit document relevant to issues in dispute in the underlying proceeding. Any compelled disclosure will not be considered to be a public document or be deemed to be a waiver of the

privilege for any other civil, criminal, or administrative proceeding. A party unsuccessfully opposing disclosure may apply to the court for an appropriate order protecting the document from further disclosure;

(5) A company asserting the insurance compliance self-evaluative privilege in response to a request for disclosure under this subsection shall provide to the commissioner or attorney general, as the case may be, at the time of filing any objection to the disclosure, all of the following information:

(A) The date of the insurance compliance self-evaluative audit document;

(B) The identity of the entity conducting the audit;

(C) The general nature of the activities covered by the insurance compliance audit; or

(D) An identification of the portions of the insurance compliance self-evaluative audit document for which the privilege is being asserted;

(j)(1) A company asserting the insurance compliance self-evaluative privilege set forth in subsection (g) has the burden of demonstrating the applicability of the privilege. Once a company has established the applicability of the privilege, the party seeking disclosure under subsection (h)(2)(A) has the burden of proving that the privilege is asserted for a fraudulent purpose. The commissioner or attorney general seeking disclosure under subsection (h)(3) has the burden of proving the elements set forth in subsection (h)(3);

(2) The parties may at any time stipulate in proceedings under subsection (h) or (i) to entry of an order directing that specific information contained in an insurance compliance self-evaluative audit document is or is not subject to the privilege provided under subsection (g). Any such stipulation may be limited to the instant proceeding and, absent specific language to the contrary, shall not be applicable to any other proceeding.

(k) The privilege set forth in subsection (g) shall not extend to any of the following:

(1) Documents, communications, data, reports, or other information expressly required to be collected, developed, maintained, or reported to a regulatory agency pursuant to this Code, or other federal or State law;

(2) Information obtained by observation or monitoring by any regulatory agency; or

(3) Information contained from a source independent of the insurance compliance audit.

(l) As used in this section:

''Insurance compliance audit'' means a voluntary, internal evaluation, review, assessment, audit, or investigation for the purpose of identifying or preventing noncompliance with, or promoting compliance with laws, regulations, orders, or industry or professional standards, which is conducted by or on behalf of a company licensed or regulated under this Code, or which involves an activity regulated under this Code.

''Insurance compliance self-evaluative audit document'' means documents prepared as a result of or in connection with an insurance compliance audit. An insurance compliance self-evaluative audit document may include, but is not limited to, as applicable, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits, computer-generated or electronically recorded information, phone records, maps, charts, graphs, and surveys, provided this supporting information is collected or developed for the primary purpose and in the course of an insurance compliance audit. An insurance compliance self-evaluative audit document also includes, but is not limited to, any of the following:

(1) An insurance compliance audit report prepared by an auditor, who may be an employee of the company or an independent contractor, which may include the scope of the audit, the information gained in the audit, and conclusions and recommendations, with exhibits and appendices;
(2) Memoranda and documents analyzing portions or all of the insurance compliance audit report and discussing potential implementation issues;
(3) An implementation plan that addresses correcting past non-compliance, improving current compliance, and preventing future non-compliance; or
(4) Analytic data generated in the course of conducting the insurance compliance audit.

(m) The insurance compliance self-evaluative privilege created by this legislation shall apply to all litigation or administrative proceedings pending at the effective date of this legislation.

(n) Nothing in this section nor the release of any self-evaluative audit document hereunder shall limit, waive, or abrogate the scope or nature of any statutory or common law privilege including, but not limited to, the work product doctrine, the attorney-client privilege, or the subsequent remedial measures exclusion.

§431: -8 Market conduct surveillance personnel. (a) Market conduct surveillance personnel shall be qualified by education, experience, and, where applicable, professional designations. The commissioner may supplement the in-house market conduct surveillance staff with qualified outside professional assistance if the commissioner determines that assistance is necessary.

(b) Market conduct surveillance personnel have a conflict of interest, either directly or indirectly, if they are affiliated with the management, have been employed by, or own a pecuniary interest in the insurer subject to any examination under this article within the most recent five years prior to the use of the personnel. This section shall not be construed to automatically preclude an individual from being:

(1) A policyholder or claimant under an insurance policy;
(2) A grantee of a mortgage or similar instrument on the individual's residence from a regulated entity if done under customary terms and in the ordinary course of business;
(3) An investment owner in shares of regulated diversified investment companies; or
(4) A settlor or beneficiary of a "blind trust" into which any otherwise permissible holdings have been placed.

§431: -9 Immunity for market conduct surveillance personnel. (a) No cause of action shall arise nor shall any liability be imposed against the commissioner, the commissioner's authorized representatives, or an examiner appointed by the commissioner for any statements made or conduct performed in good faith while carrying out this article.

(b) No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the commissioner, the commissioner's authorized representative, or the examiner pursuant to an examination made under this article, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive.

(c) A person identified in subsection (a) shall be entitled to an award of attorney's fees and costs if the person is the prevailing party in a civil cause of action for libel, slander, or any other relevant tort arising out of activities in carrying out this article and the party bringing the action was not substantially justified in doing

so. For the purposes of this section, a proceeding is ''substantially justified'' if it had a reasonable basis in law or fact at the time that it was initiated.

(d) This section shall not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified in subsection (a).

§431: -10 Fines and penalties. (a) Fines and penalties levied pursuant to this article or other provisions of this chapter shall be consistent, reasonable, and justified.

(b) The commissioner shall take into consideration actions taken by insurers that maintain membership in best-practice organizations that exist to promote high ethical standards of conduct in the marketplace, and insurers that self-assess, self-report, and remediate problems detected to mitigate fines levied pursuant to this article.

§431: -11 Data collection and participation in national market conduct databases. (a) The commissioner shall collect and report market data to the market information systems of the National Association of Insurance Commissioners, including the complaint database system, the examination tracking system, and the regulatory information retrieval system, or other comparable successor products as determined by the commissioner. In addition to complaint data, the accuracy of insurer-specific information reported to the National Association of Insurance Commissioners to be used for market analysis purposes or as the basis for market conduct actions shall be reviewed by appropriate personnel in the insurance division and by the insurer.

(b) Information collected and maintained by the insurance division shall be compiled in a manner that meets the requirements of the National Association of Insurance Commissioners.

(c) After completion of any level of market analysis, prior to further market conduct action, the commissioner shall contact the insurer to review the analysis.

(d) An insurer responding to a commissioner's request to produce information shall produce it as it is kept in the usual course of business or shall organize and label it to correspond with the categories in the demand.

If a commissioner's request does not specify the form or forms for producing electronically stored information, an insurer responding to the request shall produce the information in a form or forms in which the insurer ordinarily maintains it or in a form or forms that are reasonably usable.

An insurer responding to an information request need not produce the same electronically stored information in more than one form.

An insurer responding to an information request need not provide the electronically stored information from sources that the insurer identifies as not reasonably accessible because of undue burden or cost.

§431: -12 Coordination with other states through the National Association of Insurance Commissioners. The commissioner shall share information and coordinate the insurance division's market analysis and examination efforts with other states through the National Association of Insurance Commissioners.

§431: -13 Additional duties of the commissioner. (a) At least once per year, or more frequently if deemed necessary, the commissioner shall make available in an appropriate manner to insurers and other entities subject to the scope of this chapter, information on new laws and rules, enforcement actions, and other information the commissioner deems pertinent to ensure compliance with market conduct requirements.

(b) The commissioner shall designate a specific person or persons within the insurance division whose responsibilities shall include the receipt of information

from employees of insurers and licensed entities concerning violations of laws, as defined in this section. The person or persons shall be provided with proper training on the handling of the information, which shall be deemed a confidential communication for the purposes of this section.

(c) For any change made to a work product referenced in this article, which materially changes the way in which market analysis, market conduct actions, or market conduct examinations are conducted, the commissioner shall give notice and provide parties with an opportunity for a public hearing pursuant to chapter 91.

§431: -14 Data calls. Whether through market analysis, market conduct action, or in response to another regulatory request, any information provided in response to a data call from the commissioner or the commissioner's designee, shall be treated as confidential and privileged. It shall not be subject to subpoena and shall not be subject to discovery or admissible in evidence in any private civil action. No waiver of privilege or confidentiality shall occur as a result of responding to a data call."

SECTION 2. Section 432:1-102, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) Article 2 [~~and~~], article 13, and article _____ of chapter 431, and the powers there granted to the commissioner, shall apply to managed care plans, health maintenance organizations, or medical indemnity or hospital service associations, which are owned or controlled by mutual benefit societies, so long as such application in any particular case is in compliance with and is not preempted by applicable federal statutes and regulations."

SECTION 3. There is appropriated out of the compliance resolution fund the sum of $318,000 or so much thereof as may be necessary for fiscal year 2007-2008 and the sum of $365,000 or so much thereof as may be necessary for fiscal year 2008-2009 for the purposes of carrying out this Act.

The sums appropriated shall be expended by the department of commerce and consumer affairs for the purposes of this Act.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect on July 1, 2007.

(Approved June 29, 2007.)

Note

1. So in original.