

HOUSE BILL NO. 480

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE ANDERSON

Introduced: 2/13/06

Referred: Labor and Commerce, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to voluntary self-evaluative audits by insurers and providing for an
2 insurance compliance self-evaluative privilege; and indirectly amending Rules 104, 402,
3 and 501, Alaska Rules of Evidence, Rules 16, 26, 30, 31, 33, 34, 36, and 40, Alaska Rules
4 of Civil Procedure, and Rules 15, 16, and 17, Alaska Rules of Criminal Procedure."

5 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

6 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
7 to read:

8 FINDINGS. The legislature finds that

9 (1) an insurance compliance self-evaluative privilege will encourage insurance
10 regulated companies and persons to conduct voluntary internal audits of their compliance
11 programs and management systems and to assess and improve compliance with state and
12 federal statutes, rules, and orders;

13 (2) protection of insurance consumers is enhanced by companies' voluntary
14 compliance with this state's insurance laws and other laws, and that the public will benefit

1 from incentives to identify and remedy insurance and other compliance problems.

2 (3) protection against inappropriate disclosure of insurance company internal
3 compliance audit information will encourage voluntary compliance and improve insurance
4 market conduct; and

5 (4) the voluntary provisions of this Act will not inhibit the exercise of the
6 regulatory authority by those entrusted with protecting insurance consumers.

7 * **Sec. 2.** AS 21.06.060(e) is amended to read:

8 (e) In the performance of duties under this title, **except as provided in**
9 **AS 21.06.175**, the director may

10 (1) disclose confidential information or records to the legislature, state,
11 federal, and international regulatory or law enforcement agencies, or the National
12 Association of Insurance Commissioners if the recipient will maintain the
13 confidentiality of the information or records;

14 (2) receive information or records from state, federal, and international
15 regulatory or law enforcement authorities or the National Association of Insurance
16 Commissioners and maintain the confidentiality of the information or records if
17 requested to do so or given notice that the information or records are confidential
18 under the law of the jurisdiction supplying them; and

19 (3) enter into agreements consistent with this section governing the
20 sharing of information or records that are confidential under this title with other state,
21 federal, and international regulatory or law enforcement agencies or the National
22 Association of Insurance Commissioners for the purpose of furthering any regulatory
23 or legal action that may be taken as part of the recipient's official duties.

24 * **Sec. 3.** AS 21.06.060(f) is amended to read:

25 (f) The following information or records submitted to or obtained by the
26 director are confidential:

27 (1) personally identifiable consumer information; however, the director
28 may disclose the information or records for the purpose of attempting to resolve a
29 consumer complaint;

30 (2) information or records established by a showing satisfactory to the
31 director to be a trade secret or proprietary business information, including

1 (A) detailed health insurance claim cost data; and

2 (B) justification for usual, customary, and reasonable charge
3 determinations;

4 (3) information or records provided by a person not subject to this title
5 at the request of the director if the information or records are identified as confidential
6 by the director; [AND]

7 (4) financial analysis ratios and examination synopses concerning
8 insurance companies that are submitted to the director by the National Association of
9 Insurance Commissioners; **and**

10 **(5) information related to the insurance compliance self-evaluative**
11 **privilege under AS 21.06.175.**

12 * **Sec. 4.** AS 21.06.080(c) is amended to read:

13 (c) The director may conduct examinations and investigations of insurance
14 matters, in addition to examinations and investigations expressly authorized,
15 considered proper to determine whether any person has violated a provision of this
16 title or to secure information useful in the lawful administration of its provisions. **The**
17 **provisions of this subsection do not apply to insurance compliance audits**
18 **conducted under AS 21.06.175.**

19 * **Sec. 5.** AS 21.06.120(a) is amended to read:

20 (a) The director may examine the affairs, transactions, accounts, records, and
21 assets of each authorized and formerly authorized insurer and each licensed and
22 formerly licensed managing general agent, reinsurance intermediary broker,
23 reinsurance intermediary manager, surplus lines broker, and surplus lines association
24 as often as the director considers advisable. In scheduling and determining the nature,
25 scope, and frequency of examinations, the director may consider any factor or material
26 that the director determines is appropriate, including the results of financial statement
27 analysis and ratios, competency of management or change of ownership, actuarial
28 opinions, reports of independent certified public accountants, number and nature of
29 consumer complaints, results of prior examinations, frequency of prior violations of
30 statute and regulation, and criteria set out in the Examiners' Handbook most recently
31 approved by the National Association of Insurance Commissioners and in effect when

1 the director conducts an examination. Examination of an alien insurer may be limited
2 to its insurance transactions and affairs in the United States. Examination of a
3 reciprocal insurer may also include examination of its attorney-in-fact to the extent
4 that the transactions of the attorney-in-fact relate to the insurer. **The provisions of this**
5 **subsection do not apply to insurance compliance audits conducted under**
6 **AS 21.06.175.**

7 * **Sec. 6.** AS 21.06.120(f) is amended to read:

8 (f) For the purpose of completing an examination of a person under this title,
9 **except as provided in AS 21.06.175(b),** the director may examine or investigate any
10 person, or the business of any person, if the director determines that the examination
11 or investigation is necessary or material to the examination of the person.

12 * **Sec. 7.** AS 21.06.150(d) is amended to read:

13 (d) The director may disclose the content of an examination report,
14 preliminary examination report or results, or a matter relating to it to the insurance
15 division of this or another state or country and to law enforcement officers of this or
16 another jurisdiction. Except as allowed by this section or other provision of law, the
17 director may not disclose the contents of a preliminary examination report before the
18 report is filed in the office of the director under AS 21.06.060. **The provisions of this**
19 **subsection do not apply to insurance compliance audits conducted under**
20 **AS 21.06.175(b).**

21 * **Sec. 8.** AS 21.06.170(a) is amended to read:

22 (a) With respect to the subject of an examination, investigation, or hearing
23 being conducted by the director or an examiner, if general written authority has been
24 given the examiner by the director, the director or the examiner may subpoena
25 witnesses and administer oaths or affirmations and examine any person under oath,
26 and may compel the production of records, books, papers, contracts, and other
27 documents by attachments, if necessary. If, in connection with an examination of an
28 insurer, the director desires to examine an officer, director, or manager who is then
29 outside this state, the director is authorized to conduct and to enforce by appropriate
30 and available means an examination under oath in another state or a territory of the
31 United States in which the officer, director, or manager may then presently be, to the

1 full extent permitted by the laws of the other state or territory, this special
 2 authorization considered. An administrative law judge from the office of
 3 administrative hearings (AS 44.64.010) conducting a hearing under this title may, in
 4 the course of the hearing, exercise the powers granted to the director under this
 5 subsection. **The provisions of this subsection do not apply to insurance compliance**
 6 **audits conducted under AS 21.06.175.**

7 * **Sec. 9.** AS 21.06 is amended by adding a new section to read:

8 **Sec. 21.06.175. Insurance compliance self-evaluative privilege.** (a) Except
 9 as otherwise provided in this section, an insurance compliance audit document is
 10 privileged and is not discoverable or admissible as evidence in a legal action in a civil,
 11 criminal, or administrative proceeding. The privilege created is a matter of substantive
 12 law of this state and is not merely a procedural matter governing civil or criminal
 13 procedures in the courts of this state.

14 (b) Except as otherwise provided in this section, if a company, person, or
 15 entity performs or directs the performance of an insurance compliance audit, an
 16 officer, employee, or agent involved with the insurance compliance audit or a
 17 consultant who is hired for the purpose of performing the insurance compliance audit
 18 may not be examined in a civil, criminal, or administrative proceeding regarding the
 19 insurance compliance audit or any insurance compliance audit. The privilege in this
 20 subsection may be expressly waived by the company that prepared or caused to be
 21 prepared the insurance compliance audit document.

22 (c) An insurer may voluntarily submit a confidential insurance compliance
 23 audit document to the director in connection with examinations conducted under this
 24 chapter without waiving a privilege to which the insurer would otherwise be entitled.

25 (d) A document made confidential under (a) or (b) of this section may not be
 26 disclosed as provided under AS 21.06.060(e)(1) and 21.06.060(e)(3). To the extent the
 27 director has the authority to compel the disclosure of an insurance compliance audit
 28 document under the other provisions of applicable law, the report furnished to the
 29 director may not be provided to any other person or entity and shall be given the same
 30 confidentiality and other protection as provided for voluntarily submitted documents.

31 (e) The director may use an insurance compliance audit document furnished as

1 a result of a request of the director only to determine whether a disclosed defect in an
 2 insurer's policies and procedures or inappropriate treatment of a customer has been
 3 remedied or whether an appropriate plan for its remedy is in place.

4 (f) An insurance compliance audit document submitted to the director shall
 5 remain subject to all applicable statutory or common law privileges, including the
 6 attorney-client privilege, the work product doctrine, and subsequent remedial
 7 measures under Rule 407, Alaska Rules of Evidence. Nothing in this section,
 8 including the release of an insurance compliance audit document limits, waives, or
 9 abrogates the scope or nature of a statutory or common law privilege, including the
 10 attorney-client privilege, the work product doctrine, and subsequent remedial
 11 measures under Rule 407, Alaska Rules of Evidence.

12 (g) An insurance compliance audit document submitted to the director remains
 13 the property of the insurer and may not be subject to disclosure or production under
 14 AS 40.25.110 - 40.25.220.

15 (h) Disclosure of an insurance compliance audit document to a governmental
 16 agency does not waive the privilege set out in (a) and (b) of this section with respect to
 17 another person or governmental agency.

18 (i) A court of record, after an in camera review, may
 19 require disclosure of privileged material under (a) or (b) of this section
 20 if the court determines

21 (1) in a civil or administrative proceeding, that

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

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

24 (2) in a criminal proceeding, that

25 (A) the privilege is asserted for a fraudulent purpose;

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

27 (C) the material contains evidence relevant to the commission

28 of a criminal offense under this title and

29 (i) the director or attorney general has a compelling
 30 need for the information;

31 (ii) the information is not otherwise available; and

1 (iii) the director or attorney general is unable to obtain
2 substantially equivalent information by another means without
3 incurring unreasonable cost and delay.

4 (j) Within 30 days after the director or attorney general serves on an insurer by
5 certified mail a written request for disclosure of an insurance compliance audit
6 document, the insurer that prepared the document or caused the document to be
7 prepared may file a complaint with the appropriate court requesting an in camera
8 hearing on whether the insurance compliance audit document or portions of the
9 document are privileged or subject to disclosure. The following apply to a complaint
10 under this subsection:

11 (1) if the insurer does not file a complaint for in camera review, the
12 privilege is waived only for the particular request;

13 (2) an insurer asserting the insurance compliance self-evaluative
14 privilege in response to a request for disclosure under this subsection shall include in
15 its request for an in camera hearing

16 (A) the date of the insurance compliance audit document;

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

18 (C) the general nature of the activities covered by the insurance
19 compliance audit; and

20 (D) an identification of the portions of the insurance
21 compliance audit document for which the privilege is being asserted;

22 (3) within 45 days after the filing of the complaint in this subsection,
23 the court shall issue an order scheduling the requested in camera hearing;

24 (4) the court, after an in camera review, may require disclosure of the
25 material for which the privilege is asserted if the court determines that the conditions
26 set out in (i) of this section apply. Upon making its determination, the court may only
27 compel the disclosure of those portions of an insurance compliance audit document
28 relevant to issues in dispute in the underlying proceeding. A compelled disclosure is
29 not considered to be a public document or a waiver of the privilege for any other civil,
30 criminal, or administrative proceeding.

31 (k) At any time during a proceeding, the parties may stipulate to the entry of

1 an order directing that specific information contained in an insurance compliance audit
2 document is or is not subject to the privileges under this section. The stipulation may
3 be limited to the proceeding and, absent specific language to the contrary, may not be
4 applicable to any other proceeding.

5 (l) An insurer asserting the insurance compliance self-evaluative privilege
6 under (a) or (b) of this section has the burden of demonstrating the applicability of the
7 privilege. Once an insurer has established it is qualified for the privilege, the party
8 seeking disclosure has the burden of proving that the privilege is not available because
9 the provisions of (i) of this section apply.

10 (m) The privileges set out in (a) and (b) of this section may not extend to

11 (1) documents, communications, data, reports, or other information
12 expressly required to be collected, developed, maintained, or reported to a regulatory
13 agency under this title;

14 (2) information obtained by observation or monitoring by a regulatory
15 agency;

16 (3) information obtained from a source independent of the insurance
17 compliance audit.

18 (n) In this section,

19 (1) "insurance compliance audit" means a voluntary, internal
20 evaluation, review, assessment, audit, or investigation for the purpose of identifying or
21 preventing noncompliance with, or promoting compliance with laws, regulations,
22 orders, or industry or professional standards conducted by or on behalf of an insurer
23 licensed or regulated under this title;

24 (2) "insurance compliance audit document" means a

25 (A) a document prepared as a result of or in connection with an
26 insurance compliance audit;

27 (B) a written response to the findings of an insurance
28 compliance audit, together with related field notes, records of observations,
29 findings, opinions, suggestions, conclusions, drafts, memoranda, drawings,
30 photographs, exhibits, computer-generated or electronically recorded
31 information, telephone records, maps, charts, graphs, and surveys collected or

1 developed for the primary purpose and in the course of the audit;

2 (C) an insurance compliance audit report prepared by an
3 auditor, who may be an employee of the insurer or an independent contractor,
4 which may include the scope of the audit, the information gained in the audit,
5 and the conclusions and recommendations, with exhibits and appendices;

6 (D) a memorandum or document analyzing portions or all of
7 the insurance compliance audit report and discussing potential implementation
8 issues;

9 (E) an implementation plan that addresses correcting past
10 noncompliance, improving current compliance, and preventing future
11 noncompliance; and

12 (F) analytic data generated in the course of conducting the
13 insurance compliance audit;

14 (3) "insurer" has the meaning given in AS 21.90.900.

15 * **Sec. 10.** AS 21.06.210(a) is amended to read:

16 (a) The administrative law judge or director shall allow a party to the hearing
17 to appear in person and by counsel, to be present during the giving of all evidence, to
18 have a reasonable opportunity to inspect all documentary evidence and to examine
19 witnesses, **except as provided by AS 21.06.175**, to present evidence in support of the
20 party's interest, and to have subpoenas issued by the administrative law judge or
21 director to compel attendance of witnesses and production of evidence in the party's
22 behalf, **except as provided under AS 21.06.175**.

23 * **Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to
24 read:

25 **INDIRECT COURT RULE AMENDMENT.** The provisions of AS 21.06.175, as
26 enacted by sec. 9 of this Act, have the effect of amending Rules 104, 402, and 501, Alaska
27 Rules of Evidence, Rules 26, 30, 31, 33, 34, and 36, Alaska Rules of Civil Procedure, and
28 Rules 15, 16, and 17, Alaska Rules of Criminal Procedure, by making undiscoverable and
29 inadmissible in court, except under certain circumstances, an insurance compliance audit
30 document and related testimony. AS 21.06.175(j) amends Rules 16 and 40, Alaska Rules of
31 Civil Procedure, requiring certain matters to be included in the complaint, and requiring a

1 hearing to be scheduled within a certain time.

2 * **Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to
3 read:

4 **CONDITIONAL EFFECT.** This Act takes effect only if sec. 11 of this Act receives
5 the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the
6 State of Alaska.