



GOV. MSG. NO. 998

EXECUTIVE CHAMBERS  
HONOLULU

LINDA LINGLE  
GOVERNOR

June 29, 2007

The Honorable Colleen Hanabusa, President  
and Members of the Senate  
Twenty-Fourth State Legislature  
State Capitol, Room 409  
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

This is to inform you that on June 29, 2007, the following bill was signed into law:

HB90 HD2 SD2 CD1

A BILL FOR AN ACT RELATING TO INSURANCE.  
(ACT 227)

Sincerely,

A handwritten signature in black ink, appearing to read "Linda Lingle".

LINDA LINGLE

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# A BILL FOR AN ACT

RELATING TO INSURANCE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

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

4 **"ARTICLE**

5 **MARKET CONDUCT**

6 **§431: -1 Legislative intent.** The purpose of this  
7 article is to establish a framework for insurance division  
8 market conduct actions, including:

9 (1) Processes and systems for identifying, assessing, and  
10 prioritizing market conduct problems that have a  
11 substantial adverse impact on consumers,  
12 policyholders, and claimants;

13 (2) Market conduct actions by the commissioner to  
14 substantiate those market conduct problems and a means  
15 to remedy significant market conduct problems; and

16 (3) Procedures to communicate and coordinate market  
17 conduct actions among states to foster the most  
18 efficient and effective use of resources.



1           **§431: -2 Definitions.** As used in this article, unless  
2 the context indicates otherwise:

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

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

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

17           "Insurance compliance audit" means a voluntary, internal  
18 evaluation, review, assessment, audit, or investigation for the  
19 purpose of identifying or preventing noncompliance with, or  
20 promoting compliance with laws, regulations, orders, or industry  
21 or professional standards, which is conducted by or on behalf of



1 an insurer, or which involves an insurer activity regulated by  
2 the commissioner.

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

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



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

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

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



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

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

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

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

21 **§431: -3 Domestic responsibility and deference to other**  
22 **states.** (a) The commissioner shall be responsible for



1 conducting market conduct examinations for policyholder  
2 protection, which shall be accomplished by comprehensive or  
3 targeted examinations of domestic insurers or the affiliates of  
4 domestic insurers and targeted examinations of foreign insurers  
5 or the affiliates of foreign insurers as deemed necessary by the  
6 commissioner, based on the results of market analysis. The  
7 commissioner may delegate responsibility for conducting an  
8 examination of a domestic insurer, foreign insurer, or an  
9 affiliate of an insurer to the insurance commissioner of another  
10 state if that state's insurance commissioner agrees to accept  
11 the delegated responsibility for the examination.

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

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

21 (d) In lieu of conducting a market conduct examination of  
22 an insurer, the commissioner shall accept a report of a market



1 conduct examination on the insurer prepared by the insurance  
2 commissioner of the insurer's state of domicile or another  
3 state; provided:

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

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

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

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



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

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

14 **§431: -4 Market analysis procedures.** (a) The  
15 commissioner shall gather information from data currently  
16 available to the insurance division, as well as surveys and  
17 required reporting requirements, information collected by the  
18 National Association of Insurance Commissioners and a variety of  
19 other sources in both the public and private sectors,  
20 information from within and outside the insurance industry from  
21 objective sources, information from websites for insurers,  
22 agents, and other organizations, and information from other



1 sources; provided that prior to use, the sources are published  
2 at least annually in a bulletin or circular.

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

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

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

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

18 (b) If the analysis compels the commissioner to inquire  
19 further into a particular insurer or practice, the following  
20 continuum of market conduct actions may be considered prior to  
21 conducting a targeted, on-site market conduct examination. The



1 action selected shall be made known to the insurer in writing.

2 These actions may include but are not limited to:

- 3 (1) Correspondence with the insurer;
- 4 (2) Insurer interviews;
- 5 (3) Information gathering;
- 6 (4) Policy and procedure reviews;
- 7 (5) Interrogatories; and
- 8 (6) Review of insurer self-evaluation and compliance  
9 programs, including membership in an organization such  
10 as a best-practice organization that has as its  
11 central mission the promotion of high ethical  
12 standards in the marketplace.

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

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

- 18 (1) Eliminate requests for information that duplicate:
  - 19 (A) Information provided as part of an insurer's  
20 annual financial statement, the annual market  
21 conduct statement of the National Association of  
22 Insurance Commissioners, or other required



1 schedules, surveys, or reports that are regularly  
2 submitted to the commissioner; or

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

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

8 **§431: -5 Protocols for market conduct actions.** (a)

9 Market conduct actions taken as a result of a market analysis  
10 shall focus on the general business practices and compliance  
11 activities of insurers, rather than identifying infrequent or  
12 unintentional random errors that do not cause consumer harm.

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

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



1 (c) The insurer shall be notified of any practice or  
2 procedure which is to be the subject of a market conduct action  
3 and shall be given an opportunity to resolve such matters that  
4 arise as a result of a market analysis to the satisfaction of  
5 the commissioner before any additional market conduct actions  
6 are taken against the insurer. If the insurer has modified the  
7 practice or procedure as a result of a market conduct action  
8 taken by the insurance commissioner of another state, the  
9 commissioner shall accept appropriate documentation that the  
10 insurer has satisfactorily modified the practice or procedure  
11 and made similar modification to such practice or procedure in  
12 this State.

13 **§431: -6 Protocols for market conduct examinations.** (a)  
14 When market analysis identifies a pattern of conduct or practice  
15 by an insurer which requires further investigation, and less  
16 intrusive market conduct actions identified in section  
17 431: -4(b) are not appropriate, the commissioner has the  
18 discretion to conduct targeted market conduct examinations in  
19 accordance with procedures that are substantially similar to the  
20 National Association of Insurance Commissioners' guidelines on  
21 market conduct examination procedures.



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

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

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

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



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

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

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

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



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

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

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

- 15 (1) The name and address of the insurer being examined;
- 16 (2) The name and contact information of the examiner-in-  
17 charge;
- 18 (3) The reason for and the scope of the targeted  
19 examination;
- 20 (4) The date the examination is scheduled to begin;



- 1           (5) Identification of any non-insurance department
- 2                    personnel who will assist in the examination, if known
- 3                    at the time the notice is prepared;
- 4           (6) A time estimate for the examination;
- 5           (7) A budget and work plan for the examination and
- 6                    identification of reasonable and necessary costs and
- 7                    fees that will be included in the bill, if the cost of
- 8                    the examination is billed to the insurer; and
- 9           (8) A request for the insurer to name its examination
- 10                    coordinator.
- 11           (g) If a targeted examination is expanded beyond the
- 12 reasons provided to the insurer in the notice of the examination
- 13 required under this section, the commissioner shall provide
- 14 written notice to the insurer, explaining the extent of the
- 15 expansion and the reasons for the expansion. The commissioner
- 16 shall provide a revised work plan to the insurer before the
- 17 beginning of any significantly expanded examination, unless
- 18 extraordinary circumstances indicating a risk to consumers
- 19 require immediate action.
- 20           (h) The commissioner shall conduct a pre-examination
- 21 conference with the insurer examination coordinator and key



1 personnel to clarify expectations thirty days prior to  
2 commencement of the examination.

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

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

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

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

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



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

4 (1) The commissioner shall deliver the draft report to the  
5 insurer within sixty days of the completion of the  
6 examination. Completion of the examination shall be  
7 defined as the date the commissioner confirms in  
8 writing that the examination is completed;

9 (2) The insurer shall respond with written comments within  
10 thirty days of receipt of the draft report;

11 (3) The commissioner shall make a good faith effort to  
12 resolve issues and prepare a final report within  
13 thirty days of receipt of the insurer's written  
14 comments, unless a mutual agreement is reached to  
15 extend the deadline. The commissioner may make  
16 corrections and other changes, as appropriate; and

17 (4) The insurer, within thirty days, shall accept the  
18 final report, accept the findings of the report, file  
19 written comments, or request a hearing. An additional  
20 thirty days shall be allowed if agreed to by the  
21 commissioner and the insurer. Any such hearing



1 request shall be made in writing and shall follow  
2 chapter 91.

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

11 (k) Upon adoption of the examination report pursuant to  
12 subsection (j), the commissioner shall continue to hold the  
13 content of the examination report as private and confidential  
14 for a period of thirty days, except as provided in this  
15 subsection. During this time, the report shall not be subject  
16 to subpoena and shall not be subject to discovery or admissible  
17 as evidence in any private action; provided that no court of  
18 competent jurisdiction has ordered production. Thereafter, the  
19 commissioner shall open the report for public inspection;  
20 provided no court of competent jurisdiction has stayed its  
21 publication. This section shall not be construed to limit the  
22 commissioner's authority to use any final or preliminary market



1 conduct examination report, and examiner or insurer work papers  
2 or other documents, or any other information discovered or  
3 developed during the course of an examination in the furtherance  
4 of any legal or regulatory action that the commissioner, in the  
5 commissioner's sole discretion, may deem appropriate.

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

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

21 The commissioner shall maintain active management and  
22 oversight of examination costs and fees, including costs and



1 fees associated with the use of insurance division personnel and  
2 examiners and with retaining qualified contract examiners  
3 necessary to perform an examination. To the extent the  
4 commissioner retains outside assistance, the commissioner shall  
5 have written protocols that:

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

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



1           The commissioner may contract in accordance with applicable  
2 state contracting procedures, for qualified contract actuaries  
3 and examiners as the commissioner deems necessary; provided that  
4 the compensation and per diem allowances paid to the contract  
5 persons shall not exceed one hundred twenty-five per cent of the  
6 compensation and per diem allowances for examiners set forth in  
7 the guidelines adopted by the National Association of Insurance  
8 Commissioners, unless the commissioner demonstrates that one  
9 hundred twenty-five per cent is inadequate under the  
10 circumstances of the examination.

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

15           **§431: -7 Confidentiality requirements.** (a) Except as  
16 otherwise provided by law, market conduct surveillance personnel  
17 shall have free and full access to all books and records,  
18 employees, officers, and directors, as practicable, of the  
19 insurer during regular business hours. An insurer using a  
20 third-party model or product for any of the activities under  
21 examination shall provide, upon the request of market conduct  
22 surveillance personnel, the details of those models or products



1 to those personnel. All documents, whether from a third party  
2 or an insurer, including but not limited to working papers,  
3 third-party models or products, complaint logs, and copies  
4 thereof, created, produced, or obtained by or disclosed to the  
5 commissioner or any other person in the course of any market  
6 conduct actions made pursuant to this article, or in the course  
7 of market analysis by the commissioner of the market conditions  
8 of an insurer, or obtained by the National Association of  
9 Insurance Commissioners as a result of any of the provisions of  
10 this article, shall be confidential by law and privileged, shall  
11 not be subject to subpoena, and shall not be subject to  
12 discovery or admissible in evidence in any private civil action.

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

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

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



- 1           (1) Share documents, materials, or other information,  
2           including confidential and privileged documents,  
3           materials, or information subject to subsection (a),  
4           with other state, federal, and international  
5           regulatory agencies, law enforcement authorities, and  
6           the National Association of Insurance Commissioners  
7           and its affiliates and subsidiaries; provided that the  
8           recipient agrees to and has the legal authority to  
9           maintain the confidentiality and privileged status of  
10          the documents, materials, communications, or other  
11          information;
- 12          (2) Receive documents, materials, communications, or  
13          information, including otherwise confidential and  
14          privileged documents, materials, or information, from  
15          the National Association of Insurance Commissioners  
16          and its affiliates or subsidiaries, and from  
17          regulatory and law enforcement officials of other  
18          foreign or domestic jurisdictions, and shall maintain  
19          as confidential or privileged any document, material,  
20          or information received with notice or the  
21          understanding that it is confidential or privileged



1 under the laws of the jurisdiction that is the source  
2 of the document, material, or information; and

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

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

11 (f) To encourage insurance companies and persons  
12 conducting activities regulated under this code, both to conduct  
13 voluntary internal audits of their compliance programs and  
14 management systems and to access and improve compliance with  
15 State and federal statutes, rules, and orders, an insurance  
16 compliance self-evaluative privilege is recognized to protect  
17 the confidentiality of communication relating to voluntary  
18 internal compliance with this State's insurance and other laws  
19 and that the public will benefit from incentives to identify and  
20 remedy insurance and other compliance problems. It is further  
21 declared that limited expansion of the protection against  
22 disclosure will encourage voluntary compliance and improve



1 insurance market conduct quality and that the voluntary  
2 provisions of this section will not inhibit the exercise of the  
3 regulatory authority by those entrusted with protecting  
4 insurance consumers.

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

14 (2) If any company, person, or entity performs or directs  
15 the performance of an insurance compliance audit, an  
16 officer, employee or agent involved with the insurance  
17 audit, or any consultant who is hired for the purpose  
18 of performing the insurance compliance audit may not  
19 be examined in any civil, criminal, or administrative  
20 proceeding as to the insurance compliance audit or any  
21 insurance compliance self-evaluative audit document,  
22 as defined in this section. This subsection does not



1           apply if the privilege set forth in subsection (g) (1)  
2           of this section is determined under subsection (h) or  
3           (i) not to apply;

4           (3) A company may voluntarily submit, in connection with  
5           examinations conducted under this article, an  
6           insurance compliance self-evaluative audit document to  
7           the commissioner or the commissioner's designee, as a  
8           confidential document under this section without  
9           waiving the privilege set forth in this section to  
10          which the company would otherwise be entitled;  
11          provided, however, that the provisions in this section  
12          permitting the commissioner to make confidential  
13          documents public pursuant to this section and access  
14          to the National Association of Insurance Commissioners  
15          shall not apply to the insurance compliance self-  
16          evaluative audit document under other provisions of  
17          applicable law, any such report furnished to the  
18          commissioner shall not be provided to any other  
19          persons or entities and shall be accorded the same  
20          confidentiality and other protections as provided  
21          above for voluntarily submitted documents. Any use of  
22          an insurance compliance self-evaluative audit document



1 furnished as a result of the inappropriate treatment  
2 of customers has been remedied or that an appropriate  
3 plan for their remedy is in place.

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

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

15 (4) Disclosure of an insurance compliance self-evaluative  
16 audit document to a governmental agency, whether  
17 voluntary or pursuant to compulsion of law, shall not  
18 constitute a waiver of the privilege set forth in  
19 subsection (g)(1) with respect to any other persons or  
20 any other governmental agencies;

21 (h) (1) The privilege set forth in subsection (g) does  
22 not apply to the extent that it is expressly waived by



1 the company that prepared or caused to be prepared the  
2 insurance compliance self-evaluative audit document;

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

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

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

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

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

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

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



- 1           (i) The commissioner or attorney general has a
- 2           compelling need for the information; and
- 3           (ii) The information is not otherwise available;
- 4           and
- 5           (iii) The commissioner or attorney general is
- 6           unable to obtain the substantial equivalent
- 7           of the information by any other means
- 8           without incurring unreasonable cost and
- 9           delay.
  
- 10          (i) (1) Within thirty days after the commissioner or
- 11          attorney general serves on an insurer a written
- 12          request by certified mail for disclosure of an
- 13          insurance compliance self-evaluative audit document
- 14          under this subsection, the company that prepared or
- 15          caused the document to be prepared may file with the
- 16          appropriate court a petition requesting an in camera
- 17          hearing on whether the insurance compliance self-
- 18          evaluative audit document or portions of the document
- 19          are privileged or subject to disclosure. Failure by
- 20          the company to file a petition waives the privilege
- 21          for this request only;

- 1           (2) A company asserting the insurance compliance self-  
2           evaluative privilege in response to a request for  
3           disclosure under this subsection shall include in its  
4           request for an in camera hearing all of the  
5           information set forth in subsection (i)(5);
- 6           (3) Upon the filing of a petition under this subsection,  
7           the court shall issue an order scheduling, within  
8           forty-five days after the filing of the petition, an  
9           in camera hearing to determine whether the insurance  
10          compliance self-evaluative audit document or portions  
11          of the document are privileged under this section or  
12          subject to disclosure;
- 13          (4) The court, after an in camera review, may require  
14          disclosure of material for which the privilege in  
15          subsection (g) is asserted if the court determines,  
16          based upon its in camera review, that any one of the  
17          conditions set forth in subsection (h)(2)(A) and (B)  
18          is applicable as to a civil or administrative  
19          proceeding or that any one of the conditions set forth  
20          in subsection (h)(3)(A) through (C) is applicable as  
21          to a criminal proceeding. Upon making such a  
22          determination, the court may only compel the



1 disclosure of those portions of an insurance  
2 compliance self-evaluative audit document relevant to  
3 issues in dispute in the underlying proceeding. Any  
4 compelled disclosure will not be considered to be a  
5 public document or be deemed to be a waiver of the  
6 privilege for any other civil, criminal, or  
7 administrative proceeding. A party unsuccessfully  
8 opposing disclosure may apply to the court for an  
9 appropriate order protecting the document from further  
10 disclosure;

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

- 17 (A) The date of the insurance compliance self-  
18 evaluative audit document;
- 19 (B) The identity of the entity conducting the audit;
- 20 (C) The general nature of the activities covered by  
21 the insurance compliance audit; or



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

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

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



1 language to the contrary, shall not be applicable to  
2 any other proceeding.

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

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

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

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

14 (1) As used in this section:

15 "Insurance compliance audit" means a voluntary, internal  
16 evaluation, review, assessment, audit, or investigation for the  
17 purpose of identifying or preventing non-compliance with, or  
18 promoting compliance with laws, regulations, orders, or industry  
19 or professional standards, which is conducted by or on behalf of  
20 a company licensed or regulated under this Code, or which  
21 involves an activity regulated under this Code.



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

14 (1) An insurance compliance audit report prepared by an  
15 auditor, who may be an employee of the company or an  
16 independent contractor, which may include the scope of  
17 the audit, the information gained in the audit, and  
18 conclusions and recommendations, with exhibits and  
19 appendices;

20 (2) Memoranda and documents analyzing portions or all of  
21 the insurance compliance audit report and discussing  
22 potential implementation issues;



1 (3) An implementation plan that addresses correcting past  
2 non-compliance, improving current compliance, and  
3 preventing future non-compliance; or

4 (4) Analytic data generated in the course of conducting  
5 the insurance compliance audit.

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

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

16 **§431: -8 Market conduct surveillance personnel.** (a)

17 Market conduct surveillance personnel shall be qualified by  
18 education, experience, and, where applicable, professional  
19 designations. The commissioner may supplement the in-house  
20 market conduct surveillance staff with qualified outside  
21 professional assistance if the commissioner determines that  
22 assistance is necessary.



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

8 (1) A policyholder or claimant under an insurance policy;

9 (2) A grantee of a mortgage or similar instrument on the  
10 individual's residence from a regulated entity if done  
11 under customary terms and in the ordinary course of  
12 business;

13 (3) An investment owner in shares of regulated diversified  
14 investment companies; or

15 (4) A settlor or beneficiary of a "blind trust" into which  
16 any otherwise permissible holdings have been placed.

17 **§431: -9 Immunity for market conduct surveillance**

18 **personnel.** (a) No cause of action shall arise nor shall any  
19 liability be imposed against the commissioner, the  
20 commissioner's authorized representatives, or an examiner  
21 appointed by the commissioner for any statements made or conduct  
22 performed in good faith while carrying out this article.



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

8 (c) A person identified in subsection (a) shall be  
9 entitled to an award of attorney's fees and costs if the person  
10 is the prevailing party in a civil cause of action for libel,  
11 slander, or any other relevant tort arising out of activities in  
12 carrying out this article and the party bringing the action was  
13 not substantially justified in doing so. For the purposes of  
14 this section, a proceeding is "substantially justified" if it  
15 had a reasonable basis in law or fact at the time that it was  
16 initiated.

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

20 **§431: -10 Fines and penalties.** (a) Fines and penalties  
21 levied pursuant to this article or other provisions of this  
22 chapter shall be consistent, reasonable, and justified.



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

7 **§431: -11 Data collection and participation in national**  
8 **market conduct databases.** (a) The commissioner shall collect  
9 and report market data to the market information systems of the  
10 National Association of Insurance Commissioners, including the  
11 complaint database system, the examination tracking system, and  
12 the regulatory information retrieval system, or other comparable  
13 successor products as determined by the commissioner. In  
14 addition to complaint data, the accuracy of insurer-specific  
15 information reported to the National Association of Insurance  
16 Commissioners to be used for market analysis purposes or as the  
17 basis for market conduct actions shall be reviewed by  
18 appropriate personnel in the insurance division and by the  
19 insurer.

20 (b) Information collected and maintained by the insurance  
21 division shall be compiled in a manner that meets the



1 requirements of the National Association of Insurance  
2 Commissioners.

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

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

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

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

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



1           **§431: -12 Coordination with other states through the**  
2 **National Association of Insurance Commissioners.** The  
3 commissioner shall share information and coordinate the  
4 insurance division's market analysis and examination efforts  
5 with other states through the National Association of Insurance  
6 Commissioners.

7           **§431: -13 Additional duties of the commissioner.** (a)  
8 At least once per year, or more frequently if deemed necessary,  
9 the commissioner shall make available in an appropriate manner  
10 to insurers and other entities subject to the scope of this  
11 chapter, information on new laws and rules, enforcement actions,  
12 and other information the commissioner deems pertinent to ensure  
13 compliance with market conduct requirements.

14           (b) The commissioner shall designate a specific person or  
15 persons within the insurance division whose responsibilities  
16 shall include the receipt of information from employees of  
17 insurers and licensed entities concerning violations of laws, as  
18 defined in this section. The person or persons shall be  
19 provided with proper training on the handling of the  
20 information, which shall be deemed a confidential communication  
21 for the purposes of this section.



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

7 **§431: -14 Data calls.** Whether through market analysis,  
8 market conduct action, or in response to another regulatory  
9 request, any information provided in response to a data call  
10 from the commissioner or the commissioner's designee, shall be  
11 treated as confidential and privileged. It shall not be subject  
12 to subpoena and shall not be subject to discovery or admissible  
13 in evidence in any private civil action. No waiver of privilege  
14 or confidentiality shall occur as a result of responding to a  
15 data call."

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

18 "(b) Article 2 [~~and~~], article 13, and article \_\_\_\_\_ of  
19 chapter 431, and the powers there granted to the commissioner,  
20 shall apply to managed care plans, health maintenance  
21 organizations, or medical indemnity or hospital service  
22 associations, which are owned or controlled by mutual benefit



1 societies, so long as such application in any particular case is  
2 in compliance with and is not preempted by applicable federal  
3 statutes and regulations."

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

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

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

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

APPROVED this 29 day of JUN, 2007



GOVERNOR OF THE STATE OF HAWAII

