

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.



H.B. NO. 90
H.D. 2
S.D. 2
C.D. 1

Report Title:

Insurance; Market Conduct

Description:

Enacts the National Conference of Insurance Legislators market conduct surveillance model law, which establishes a framework for the insurance commissioner to conduct market conduct examinations of domestic and foreign insurers. Appropriates funds. (HB90 CD1)

