

1 STATE OF OKLAHOMA

2 2nd Session of the 53rd Legislature (2012)

3 HOUSE BILL 2667

By: Jordan

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5  
6 AS INTRODUCED

7 An Act relating to insurance; defining terms;  
8 creating privilege for certain self-evaluative  
9 audits; prohibiting examination of entity performing  
10 certain audit; specifying exception; allowing for  
11 voluntary submission of certain audit document;  
12 specifying document shall remain confidential;  
13 prohibiting Insurance Commissioner from making  
14 certain use of document; specifying document shall  
15 remain subject to certain privileges; specifying  
16 document in possession of Commissioner shall not be  
17 subject to disclosure; providing that certain  
18 disclosure shall not constitute a waiver of  
19 privilege; specifying privilege may be expressly  
20 waived; authorizing a court of record to disclose  
21 certain privileged material; specifying requirements;  
22 authorizing a court in a criminal proceeding to  
23 disclose certain privileged material; specifying  
24 requirements; providing procedure to prevent certain  
requested disclosures of material; specifying failure  
to petition shall constitute waiver; establishing  
procedure for hearings on disclosure of certain  
material; requiring court to issue order within  
certain period; authorizing court to require certain  
disclosures; providing that compelled disclosures  
shall not be considered a public document; specifying  
information required of company asserting certain  
privilege; providing that company asserting certain  
privilege has the burden of demonstrating  
applicability of privilege; authorizing certain  
stipulations; specifying items or information not to  
be considered privileged; providing for applicability  
of act; specifying act shall not limit or negate any  
other statutory or common law privileges; providing  
for codification; and providing an effective date.

1 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

2 SECTION 1. NEW LAW A new section of law to be codified  
3 in the Oklahoma Statutes as Section 6830 of Title 36, unless there  
4 is created a duplication in numbering, reads as follows:

5 As used in this act:

6 1. "Insurance compliance audit" means a voluntary internal  
7 evaluation, review, assessment, audit, or investigation for the  
8 purpose of identifying or preventing noncompliance with, or  
9 promoting compliance with, laws, regulations, orders, or industry or  
10 professional standards, which is conducted by or on behalf of a  
11 company licensed or regulated under the Oklahoma Insurance Code, or  
12 which involves an activity regulated under this Code; and

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

- a. an insurance compliance audit report prepared by an auditor, who may be an employee of the company or an independent contractor, which may include the scope of the audit, the information gained in the audit, and conclusions and recommendations, with exhibits and appendices,
- b. memoranda and documents analyzing portions or all of the insurance compliance audit report and discussing potential implementation issues,
- c. an implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance, or
- d. analytic data generated in the course of conducting the insurance compliance audit.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6831 of Title 36, unless there is created a duplication in numbering, reads as follows:

A. Except as provided in Sections 3 and 4 of this act, an insurance compliance self-evaluative audit is privileged information and is not discoverable, or admissible as evidence in any legal action in any civil, criminal, or administrative proceeding. The privilege created in this section is a matter of substantive law of this state and is not merely a procedural matter governing civil or criminal procedures in the courts of this state.

1       B. If any company, person, or entity performs or directs the  
2 performance of an insurance compliance audit, an officer, employee  
3 or agent involved with the insurance audit, or any consultant who is  
4 hired for the purpose of performing the insurance compliance audit,  
5 may not be examined in any civil, criminal, or administrative  
6 proceeding as to the insurance compliance audit or any insurance  
7 compliance self-evaluative audit document, as defined in this  
8 section. This section shall not apply if the privilege set forth in  
9 subsection A of this section is determined under Section 3 or 4 of  
10 this act not to apply.

11       C. A company may voluntarily submit, in connection with  
12 examinations conducted under this act, an insurance compliance self-  
13 evaluative audit document to the Insurance Commissioner, or  
14 designee, as a confidential document without waiving the privilege  
15 set forth in this section to which the company would otherwise be  
16 entitled; provided, however, that the provisions of the Oklahoma  
17 Insurance Code permitting the Commissioner to make confidential  
18 documents public and grant access to documents to the National  
19 Association of Insurance Commissioners shall not apply to the  
20 insurance compliance self-evaluative audit document. Any report  
21 furnished to the Insurance Commissioner shall not be provided to any  
22 other persons or entities and shall be accorded the same  
23 confidentiality and other protections as provided for voluntarily  
24 submitted documents.

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

6 E. Any compliance self-evaluative audit document submitted to  
7 and in the possession of the Commissioner shall remain the property  
8 of the company and shall not be subject to any disclosure or  
9 production under the Oklahoma Open Records Act.

10 F. Disclosure of an insurance compliance self-evaluative audit  
11 document to a governmental agency, whether voluntary or pursuant to  
12 compulsion of law, shall not constitute a waiver of the privilege  
13 set forth in subsection A of this section with respect to any other  
14 persons or any other governmental agencies.

15 SECTION 3. NEW LAW A new section of law to be codified  
16 in the Oklahoma Statutes as Section 6832 of Title 36, unless there  
17 is created a duplication in numbering, reads as follows:

18 A. The privilege set forth in Section 2 of this act shall not  
19 apply to the extent that it is expressly waived by the company that  
20 prepared or caused to be prepared the insurance compliance self-  
21 evaluative audit document.

22 B. In a civil or administrative proceeding, a court of record  
23 may, after an in camera review, require disclosure of material for  
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1 which the privilege set forth in Section 2 of this act is asserted,  
2 if the court determines one of the following:

- 3 1. The privilege is asserted for a fraudulent purpose; or
- 4 2. The material is not subject to the privilege.

5 C. In a criminal proceeding, a court of record may, after an in  
6 camera review, require disclosure of material for which the  
7 privilege described in Section 2 of this act is asserted, if the  
8 court determines one of the following:

- 9 1. The privilege is asserted for a fraudulent purpose;
- 10 2. The material is not subject to the privilege; or
- 11 3. The material contains evidence relevant to commission of a  
12 criminal offense under the Oklahoma Insurance Code, and all three of  
13 the following factors are present:

- 14 a. the Insurance Commissioner, district attorney, or  
15 Attorney General has a compelling need for the  
16 information,
- 17 b. the information is not otherwise available, and
- 18 c. the Insurance Commissioner, district attorney, or  
19 Attorney General is unable to obtain the substantial  
20 equivalent of the information by any other means  
21 without incurring unreasonable cost and delay.

22 SECTION 4. NEW LAW A new section of law to be codified  
23 in the Oklahoma Statutes as Section 6833 of Title 36, unless there  
24 is created a duplication in numbering, reads as follows:

1       A. Within thirty (30) days after the Insurance Commissioner,  
2 district attorney, or Attorney General serves on an insurer a  
3 written request by certified mail for disclosure of an insurance  
4 compliance self-evaluative audit document under this act, the  
5 company that prepared the document or caused the document to be  
6 prepared may file with the appropriate court a petition requesting  
7 an in camera hearing on whether the insurance compliance self-  
8 evaluative audit document or portions of the document are privileged  
9 or subject to disclosure. Failure by the company to file a petition  
10 waives the privilege for this request only.

11       B. A company asserting the insurance compliance self-evaluative  
12 privilege in response to a request for disclosure under this act  
13 shall include in its request for an in camera hearing all of the  
14 information set forth in subsection E of this section.

15       C. Upon the filing of a petition under this section, the court  
16 shall issue an order scheduling, within forty-five (45) days after  
17 the filing of the petition, an in camera hearing to determine  
18 whether the insurance compliance self-evaluative audit document or  
19 portions of the document are privileged under this section or  
20 subject to disclosure.

21       D. The court, after an in camera review, may require disclosure  
22 of material for which the privilege in Section 2 of this act is  
23 asserted if the court determines, based upon its in camera review,  
24 that any one of the conditions set forth in subsection B of Section

1 3 of this act is applicable as to a civil or administrative  
2 proceeding or that any one of the conditions set forth in subsection  
3 C of Section 3 of this act is applicable as to a criminal  
4 proceeding. Upon making a determination, the court may only compel  
5 the disclosure of those portions of an insurance compliance self-  
6 evaluative audit document relevant to issues in dispute in the  
7 proceeding before the court. Any compelled disclosure shall not be  
8 considered a public document or deemed a waiver of the privilege for  
9 any other civil, criminal, or administrative proceeding. A party  
10 unsuccessfully opposing disclosure may apply to the court for an  
11 appropriate order protecting the document from further disclosure.

12 E. A company asserting the insurance compliance self-evaluative  
13 privilege in response to a request for disclosure under this act  
14 shall provide to the Insurance Commissioner, district attorney, or  
15 Attorney General, as the case may be, at the time of filing any  
16 objection to the disclosure, all of the following information:

17 1. The date of the insurance compliance self-evaluative audit  
18 document;

19 2. The identity of the entity conducting the audit;

20 3. The general nature of the activities covered by the  
21 insurance compliance self-evaluative audit; and

22 4. An identification of the portions of the insurance  
23 compliance self-evaluative audit document for which the privilege is  
24 being asserted.

1           SECTION 5.           NEW LAW           A new section of law to be codified  
2 in the Oklahoma Statutes as Section 6834 of Title 36, unless there  
3 is created a duplication in numbering, reads as follows:

4           A. A company asserting the insurance compliance self-evaluative  
5 privilege set forth in Section 2 of this act has the burden of  
6 demonstrating the applicability of the privilege. Once a company  
7 has established the applicability of the privilege, the party  
8 seeking disclosure under this act has the burden of proving that the  
9 privilege is asserted for a fraudulent purpose. The Insurance  
10 Commissioner, district attorney, or Attorney General seeking  
11 disclosure under this act has the burden of proving the elements set  
12 forth in subsection B or C of Section 3 of this act.

13           B. The parties may at any time stipulate in proceedings under  
14 Section 3 or 4 of this act to entry of an order directing that  
15 specific information contained in an insurance compliance self-  
16 evaluative audit document is or is not subject to the privilege  
17 provided under Section 2 of this act. Any such stipulation may be  
18 limited to the instant proceeding and, absent specific language to  
19 the contrary, shall not be applicable to any other proceeding.

20           SECTION 6.           NEW LAW           A new section of law to be codified  
21 in the Oklahoma Statutes as Section 6835 of Title 36, unless there  
22 is created a duplication in numbering, reads as follows:

23           The privilege set forth in Section 2 of this act shall not  
24 extend to any of the following:

1 1. Documents, communications, data, reports, or other  
2 information expressly required to be collected, developed,  
3 maintained, or reported to a regulatory agency pursuant to this act,  
4 or other federal or state law;

5 2. Information obtained by observation or monitoring by any  
6 regulatory agency; or

7 3. Information contained from a source independent of the  
8 insurance compliance audit.

9 SECTION 7. NEW LAW A new section of law to be codified  
10 in the Oklahoma Statutes as Section 6836 of Title 36, unless there  
11 is created a duplication in numbering, reads as follows:

12 The insurance compliance self-evaluative privilege created by  
13 this act shall apply to all litigation or administrative proceedings  
14 pending on November 1, 2012.

15 SECTION 8. NEW LAW A new section of law to be codified  
16 in the Oklahoma Statutes as Section 6837 of Title 36, unless there  
17 is created a duplication in numbering, reads as follows:

18 Nothing in this act nor the release of any self-evaluative audit  
19 document under this act shall limit, waive, or abrogate the scope or  
20 nature of any statutory or common law privilege including, but not  
21 limited to, the work product doctrine, the attorney-client  
22 privilege, or the subsequent remedial measures exclusion.

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SECTION 9. This act shall become effective November 1, 2012.

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