

By: Eiland

H.B. No. 998

A BILL TO BE ENTITLED

AN ACT

relating to insurance market conduct surveillance; imposing sanctions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 5, Insurance Code, is amended by adding Subtitle G to read as follows:

SUBTITLE G. REGULATION OF INSURER MARKET CONDUCT

CHAPTER 751. MARKET CONDUCT SURVEILLANCE

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 751.001. SHORT TITLE. This chapter may be cited as the Insurance Market Conduct Surveillance Act.

Sec. 751.002. PURPOSE. The purpose of this chapter is to establish a framework for department market conduct actions, including:

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

(2) development of appropriate market conduct actions by the commissioner as required to:

(A) substantiate market conduct problems; and

(B) remedy significant market conduct problems;

and

(3) procedures to communicate and coordinate market conduct actions with other states to foster the most efficient and

1 effective use of resources.

2 Sec. 751.003. DEFINITIONS. In this chapter:

3 (1) "Complaint" means a written or documented oral
4 communication, the primary intent of which is to express a
5 grievance or an expression of dissatisfaction.

6 (2) "Desk examination" means a targeted examination
7 conducted by an examiner at a location other than an insurer's
8 premises. The term includes an examination performed at the
9 department's offices during which the insurer provides requested
10 documents for department review by hard copy or by microfiche,
11 disk, or other electronic media.

12 (3) "Market analysis" means a process under which
13 market conduct surveillance personnel collect and analyze
14 information from filed schedules, surveys, required reports, and
15 other sources as necessary to:

16 (A) develop a baseline understanding of the
17 marketplace; and

18 (B) identify insurer patterns or practices that:
19 (i) deviate significantly from the norm; or
20 (ii) may pose a potential risk to the
21 insurance consumer.

22 (4) "Market analysis handbook" means the outline of
23 the elements and objectives of market analysis as developed and
24 adopted by the National Association of Insurance Commissioners, and
25 used to establish a uniform process by which states may establish
26 and implement market analysis programs.

27 (5) "Market conduct action" means any activity that

1 the commissioner may initiate to assess and address insurer market
2 practices. The term includes a market analysis and a targeted
3 examination. The term does not include:

4 (A) a commissioner action taken to resolve an
5 individual consumer complaint; or

6 (B) another report relating to a specific
7 instance of insurer misconduct.

8 (6) "Market conduct examiner's handbook" means the set
9 of guidelines, developed and adopted by the National Association of
10 Insurance Commissioners, that document established practices to be
11 used by market conduct surveillance personnel in developing and
12 executing an examination under this chapter.

13 (7) "Market conduct surveillance personnel" means
14 those individuals employed by or under contract with the department
15 who collect, analyze, review, or act on information regarding
16 insurer patterns or practices.

17 (8) "Market conduct uniform examination procedures"
18 means the set of guidelines developed and adopted by the National
19 Association of Insurance Commissioners designed to be used by
20 market conduct surveillance personnel in conducting an examination
21 under this chapter.

22 (9) "On-site examination" means a targeted
23 examination that is conducted at:

24 (A) the insurer's home office; or

25 (B) another location at which the records under
26 review are stored.

27 (10) "Qualified contract examiner" means a person

1 qualified by education, experience, and any applicable
2 professional designations who is under contract with the
3 commissioner to perform market conduct actions.

4 (11) "Standard data request" means the set of field
5 names and descriptions developed and adopted by the National
6 Association of Insurance Commissioners for use by market conduct
7 surveillance personnel in an examination.

8 (12) "Targeted examination" means a focused
9 examination based on the results of market analysis that indicate
10 the need to review either a specific line of the business of
11 insurance or specific insurance business practices, including:

12 (A) underwriting and rating;

13 (B) marketing and sales;

14 (C) complaint handling operations and
15 management;

16 (D) advertising materials;

17 (E) licensing;

18 (F) policyholder services;

19 (G) nonforfeitures;

20 (H) claims handling; or

21 (I) policy forms and filings.

22 (13) "Third-party model or product" means a model or
23 product provided by an entity that is separate from and not under
24 direct or indirect corporate control of the insurer using the model
25 or product.

26 Sec. 751.004. IMMUNITY. (a) A cause of action does not
27 arise, and liability may not be imposed, for any statements made or

1 conduct performed in good faith while implementing this chapter,
2 against:

3 (1) the commissioner;

4 (2) an authorized representative of the commissioner;

5 or

6 (3) an examiner appointed by the commissioner.

7 (b) A cause of action does not arise, and liability may not
8 be imposed, against any person for the act of communicating or
9 delivering information or data to the commissioner or the
10 commissioner's authorized representative or examiner under an
11 examination made under this chapter, if the act of communication or
12 delivery was performed in good faith and without fraudulent intent
13 or the intent to deceive.

14 (c) A person identified in Subsection (a) is entitled to
15 attorney's fees and costs if the person is the prevailing party in a
16 civil cause of action for libel, slander, or any other relevant tort
17 arising out of activities conducted in implementing this chapter,
18 and the party bringing the action was not substantially justified
19 in doing so. For purposes of this subsection, an action is
20 "substantially justified" if the action had a reasonable basis in
21 law or fact at the time that it was initiated.

22 (d) This section does not abrogate or modify any common law
23 or statutory privilege or immunity.

24 [Sections 751.005-751.050 reserved for expansion]

25 SUBCHAPTER B. GENERAL POWERS AND DUTIES OF COMMISSIONER

26 Sec. 751.051. PARTICIPATION IN NATIONAL MARKET CONDUCT

27 DATABASES. (a) The commissioner shall collect and report market

1 data to the National Association of Insurance Commissioner's market
2 information systems, including the complaint database system, the
3 examination tracking system, the regulatory information retrieval
4 system, or other successor systems of that association, as
5 determined by the commissioner.

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

9 Sec. 751.052. COORDINATION WITH OTHER STATES. The
10 commissioner shall share information and coordinate the
11 department's market analysis and examination efforts with other
12 states through the National Association of Insurance
13 Commissioners.

14 Sec. 751.053. INFORMATION FROM COMMISSIONER. (a) At least
15 once annually or more frequently if determined necessary by the
16 commissioner, the commissioner shall provide in an appropriate
17 manner to insurers and other entities subject to this code
18 information regarding new laws and rules, enforcement actions, and
19 other information the commissioner considers relevant to ensure
20 compliance with market conduct requirements.

21 (b) Failure by the commissioner to provide the information
22 described by Subsection (a) does not constitute a defense for an
23 insurer who fails to comply with an insurance law of this state.

24 Sec. 751.054. REPORT OF VIOLATIONS. (a) The commissioner
25 shall designate an individual within the department whose
26 responsibilities shall include the receipt of information from
27 employees of insurers and other entities regulated by the

1 department regarding violations of laws or rules by their
2 employers. The commissioner's designee shall be properly trained
3 in the handling of that information.

4 (b) Information received under this section is a
5 confidential communication and is not public information.

6 [Sections 751.055-751.100 reserved for expansion]

7 SUBCHAPTER C. MARKET ANALYSIS PROCEDURES

8 Sec. 751.101. COLLECTION OF INFORMATION; COMMISSIONER
9 ANALYSIS. (a) The commissioner shall gather insurance market
10 information from:

11 (1) data available to the department, including survey
12 results and information required to be reported to the department;

13 (2) information collected by the National Association
14 of Insurance Commissioners and other public and private sources;
15 and

16 (3) information from within and outside the insurance
17 industry.

18 (b) The commissioner shall analyze the information compiled
19 under Subsection (a) as necessary to:

20 (1) develop a baseline understanding of the insurance
21 marketplace; and

22 (2) identify for further review insurers or insurance
23 practices that deviate significantly from the norm or that may pose
24 a potential risk to the insurance consumer.

25 (c) The commissioner shall use the market analysis handbook
26 as a resource in performing the analysis required under this
27 section.

1 Sec. 751.102. ADDITIONAL ANALYSIS OF MARKET ACTIONS. (a)

2 If, as a result of the market analysis, the commissioner determines
3 that further inquiry into a particular insurer or insurance
4 practice is needed, the commissioner may consider taking one or
5 more of the market conduct actions described by Subsection (b)
6 before conducting a targeted, on-site market conduct examination.
7 If a market conduct action selected by the commissioner requires
8 the participation of or a response by the affected insurer, the
9 commissioner shall notify the insurer of the action selected in
10 writing.

11 (b) Market conduct actions described by Subsection (a) may
12 include:

- 13 (1) correspondence with the insurer;
14 (2) insurer interviews;
15 (3) information gathering;
16 (4) policy and procedure reviews;
17 (5) interrogatories;
18 (6) review of insurer self-evaluation and compliance
19 programs, including insurer membership in a best-practice
20 organization; and
21 (7) desk examinations.

22 (c) The commissioner shall select market conduct actions
23 that are cost effective for the department and the insurer while
24 protecting the interests of the insurance consumer.

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

- 27 (1) eliminate duplicative inquiries; and

1 (2) coordinate the market conduct actions and findings
2 of this state with those of other states.

3 Sec. 751.103. PROTOCOLS FOR MARKET CONDUCT ACTIONS. (a)
4 Each market conduct action taken as a result of a market analysis
5 must focus on the general business practices and compliance
6 activities of insurers, rather than identifying infrequent or
7 unintentional random errors that do not cause significant consumer
8 harm.

9 (b) The commissioner may determine the frequency and timing
10 of the market conduct actions. The timing of an action depends on
11 the specific market conduct action to be initiated unless
12 extraordinary circumstances indicating a risk to consumers require
13 immediate action.

14 (c) If the commissioner has information that more than one
15 insurer is engaged in practices that may violate statutes or rules,
16 the commissioner may schedule and coordinate multiple examinations
17 simultaneously.

18 (d) The commissioner may provide an insurer with an
19 opportunity to resolve to the satisfaction of the commissioner any
20 matter that arises as a result of a market analysis before any
21 additional market conduct actions are taken against the insurer.

22 (e) For an application by the department of a handbook,
23 guideline, or other product referenced in this chapter that is the
24 work product of the National Association of Insurance Commissioners
25 that changes the way in which market conduct actions are conducted,
26 the commissioner shall give notice and provide interested parties
27 with an opportunity for a public hearing as provided by Chapter

1 2001, Government Code, if the change:

2 (1) necessitates a change in a statute or rule; or

3 (2) deviates from the applicable handbook, guideline,
4 or other product most recently adopted by the National Association
5 of Insurance Commissioners.

6 (f) Except as otherwise provided by law, each insurer or
7 person from whom information is sought, and each officer, director,
8 or agent of that insurer or person, shall provide the commissioner
9 with convenient and free access to all books, records, accounts,
10 papers, documents and any computer or other recordings relating to
11 the property, assets, business and affairs of the insurer or
12 person.

13 (g) Each officer, director, employee, insurance producer,
14 and agent of an insurer or person described by Subsection (f) shall,
15 to the extent of that individual's ability, facilitate and aid in a
16 department market conduct action.

17 [Sections 751.104-751.150 reserved for expansion]

18 SUBCHAPTER D. MARKET CONDUCT EXAMINATIONS

19 Sec. 751.151. EXAMINATION. (a) If the commissioner
20 determines that a market conduct action described by Section
21 751.102(b) is not appropriate, the department may conduct a
22 targeted market conduct examination in accordance with the market
23 conduct uniform examination procedures and the market conduct
24 examiners handbook.

25 (b) A targeted examination may be conducted through a desk
26 examination or an on-site examination. To the extent feasible, the
27 department shall conduct a market conduct examination through desk

1 examinations and data requests before conducting an on-site
2 examination.

3 (c) The department shall conduct a market conduct
4 examination in accordance with the market conduct examiners
5 handbook and the market conduct uniform examinations procedures.

6 (d) The department shall use the standard data request or a
7 successor product that is substantially similar to the standard
8 data request as adopted by the commissioner by rule.

9 Sec. 751.152. EXAMINATION OF FOREIGN AND ALIEN INSURERS.

10 In examining a foreign or alien insurer licensed in this state, the
11 commissioner may, in lieu of conducting an examination under
12 Section 751.151, accept an examination report made by another state
13 that has a market surveillance system determined by the
14 commissioner to be substantially similar to the market surveillance
15 system adopted under this chapter.

16 Sec. 751.153. WORK PLAN. Before beginning a targeted
17 on-site market conduct examination, market conduct surveillance
18 personnel shall prepare a work plan that includes:

19 (1) the name and address of the insurer to be examined;

20 (2) the name and contact information of the
21 examiner-in-charge;

22 (3) a statement of the reasons for the targeted,
23 on-site examination;

24 (4) a description of the scope of the targeted,
25 on-site examination;

26 (5) the date the on-site examination is scheduled to
27 begin;

1 (6) notice to any non-insurance department personnel
2 who will assist in the examination;

3 (7) a time estimate for the examination; and

4 (8) if the cost of the examination is billed to the
5 affected insurer:

6 (A) a budget for the examination; and

7 (B) an identification of factors that will be
8 included in the billing.

9 Sec. 751.154. NOTICE OF MARKET CONDUCT EXAMINATION. (a)
10 Unless the examination is conducted in response to extraordinary
11 circumstances as described by Section 751.103(b), the department
12 shall notify an affected insurer of an on-site examination not
13 later than the 60th day before the scheduled date of the beginning
14 of the examination. The notice must include the examination work
15 plan and a request that the insurer name an examination coordinator
16 for the insurer.

17 (b) In addition to the notice required under Subsection (a),
18 the commissioner shall post notice that a market conduct
19 examination has been scheduled on the National Association of
20 Insurance Commissioners examination tracking system.

21 Sec. 751.155. PRE-EXAMINATION CONFERENCE. Not later than
22 the 30th day before the scheduled date of the examination, the
23 commissioner shall conduct a pre-examination conference with the
24 insurer's examination coordinator and key personnel to clarify
25 expectations.

26 Sec. 751.156. EXIT CONFERENCE. Before the conclusion of a
27 targeted on-site market conduct examination, the member of the

1 market conduct surveillance personnel who is designated as the
2 examiner-in-charge shall schedule an exit conference with the
3 insurer.

4 Sec. 751.157. EXAMINATION REPORT. (a) Unless the
5 commissioner and the insurer agree to a different schedule, the
6 commissioner shall follow the time line established under this
7 section.

8 (b) The commissioner shall deliver the draft examination
9 report to the insurer not later than the 60th day after the date the
10 examination is completed. For purposes of this section, the date
11 the examination is completed is the date that the commissioner
12 confirms in writing that the examination is completed.

13 (c) Not later than the 30th day after the date on which the
14 insurer receives the draft examination report, the insurer shall
15 provide any written comments regarding the report to the
16 department.

17 (d) The department shall make a good faith effort to resolve
18 issues with the insurer informally and shall prepare a final
19 examination report not later than the 30th day after the date of
20 receipt of the insurer's written comments on the draft report
21 unless a mutual agreement is reached to extend the deadline.

22 (e) The department shall include the insurer's responses in
23 the final examination report. The responses may be included as an
24 appendix or in the text of the examination report. An insurer is
25 not obligated to submit a response. An individual involved in the
26 examination may not be named in either the report or the insurer
27 response except to acknowledge the individual's involvement.

1 (f) The commissioner may make corrections and other changes
2 to the final examination report as appropriate, and shall issue the
3 report to the insurer. Not later than the 30th day after receipt of
4 the final examination report under this subsection, the insurer
5 shall accept the report, accept the findings of the report, or
6 request a hearing. The commissioner and the insurer by mutual
7 agreement may extend the period for an additional 30 days. A
8 request for a hearing must be made in writing and must follow the
9 requirements of Chapter 2001, Government Code.

10 Sec. 751.158. CONFIDENTIALITY OF EXAMINATION REPORT
11 INFORMATION. (a) Except as provided by Subsection (b), the
12 commissioner shall maintain the confidentiality of information
13 included in a final examination report until the 30th day after the
14 date on which the report is issued. On the expiration of the 30th
15 day, the information becomes public information unless access to
16 the information is stayed by a court.

17 (b) This chapter does not prevent the commissioner from
18 disclosing at any time the contents of an examination report,
19 including a preliminary examination report, or the results of an
20 examination, or any matter relating to an examination report,
21 preliminary examination report, or the results of an examination,
22 to the department, the insurance department of any other state, or
23 an agency of the federal government, if the department or agency
24 receiving the report or matter relating to the report agrees to
25 maintain the information as confidential and in a manner consistent
26 with this chapter.

27 Sec. 751.159. ASSESSMENT OF COSTS OF EXAMINATION. (a) If

1 the reasonable and necessary cost of a market conduct examination
2 is to be assessed against the affected insurer, fees for that cost
3 must be consistent with those otherwise authorized by law. The fees
4 must be itemized and bills for the fees must be provided to the
5 insurer on a monthly basis for review prior to submission for
6 payment.

7 (b) The commissioner shall actively manage and oversee
8 examination costs, including costs associated with the use of
9 department examiners and with retaining qualified contract
10 examiners necessary to perform an on-site examination. To the
11 extent the commissioner retains outside assistance, the
12 commissioner shall adopt by rule written protocols that:

13 (1) clearly identify the types of functions to be
14 subject to outsourcing;

15 (2) provide specific time lines for completion of the
16 outsourced review;

17 (3) require disclosure of recommendations made by
18 contract examiners;

19 (4) establish and use a dispute resolution or
20 arbitration mechanism to resolve conflicts with insurers regarding
21 examination fees; and

22 (5) require disclosure of the terms of contracts
23 entered into with outside consultants, and specifically terms
24 regarding the fees or hourly rates that may be charged by those
25 consultants.

26 (c) The commissioner must review and affirmatively endorse
27 detailed billings made by a qualified contract examiner before the

1 detailed billings are sent to the insurer.

2 [Sections 751.160-751.200 reserved for expansion]

3 SUBCHAPTER E. CONFIDENTIALITY REQUIREMENTS

4 Sec. 751.201. CONFIDENTIAL DOCUMENTS. (a) A document is
5 confidential and privileged if the document is a working paper,
6 third-party model or product, complaint log, or other document that
7 is:

8 (1) created, produced, or obtained by or disclosed to
9 the commissioner or any other person in the course of:

10 (A) a market conduct action made under this
11 chapter; or

12 (B) a market analysis by the commissioner of the
13 market conditions of an insurer; or

14 (2) obtained by the National Association of Insurance
15 Commissioners as a result of this chapter.

16 (b) The document confidentiality requirements under
17 Subsection (a) apply to a copy of the document.

18 (c) A document made confidential under this section is not
19 subject to subpoena and may not be subject to discovery or be
20 admissible in evidence in any private civil action.

21 Sec. 751.202. NO WAIVER. The disclosure to the
22 commissioner under this subchapter of a document, material, or
23 information does not constitute the waiver of any applicable
24 privilege or claim of confidentiality regarding the document,
25 material, or information.

26 Sec. 751.203. AUTHORITY OF COMMISSIONER. (a) The
27 commissioner may share documents, materials, or other information,

1 including the confidential and privileged documents, materials, or
2 information described by Section 751.201, with other state, federal
3 and international regulatory agencies and law enforcement
4 authorities and the National Association of Insurance
5 Commissioners and that association's affiliates and subsidiaries,
6 if the recipient agrees to and has the legal authority to maintain
7 the confidentiality and privileged status of the document,
8 material, or other information.

9 (b) The commissioner may receive documents, materials, or
10 information, including otherwise confidential and privileged
11 documents, materials, or information, from the National
12 Association of Insurance Commissioners and that association's
13 affiliates or subsidiaries, and from regulatory and law enforcement
14 officials of other foreign or domestic jurisdictions. The
15 commissioner shall maintain as confidential or privileged any
16 document, material, or information received with notice or the
17 understanding that the document, material, or information is
18 confidential or privileged under the laws of the jurisdiction that
19 is the source of the document, material, or information.

20 (c) Consistent with this section, the commissioner may
21 enter into agreements governing the sharing and use of information.

22 [Sections 751.204-751.250 reserved for expansion]

23 SUBCHAPTER F. MARKET CONDUCT SURVEILLANCE PERSONNEL

24 Sec. 751.251. PERSONNEL; QUALIFICATIONS. (a) To conduct
25 market conduct surveillance under this chapter, the commissioner
26 may designate department staff to perform duties under this
27 chapter, and may supplement that staff with qualified outside

1 professional assistance if the commissioner determines that that
2 assistance is necessary.

3 (b) Market conduct surveillance personnel must be qualified
4 by education and experience and, if applicable, must hold
5 appropriate professional designations.

6 Sec. 751.252. CONFLICT OF INTEREST. (a) An individual who
7 is a member of the market conduct surveillance personnel has a
8 conflict of interest, either directly or indirectly, if the
9 individual is affiliated with the management of, has been employed
10 by, or owns a pecuniary interest in, an insurer subject to an
11 examination conducted under this chapter.

12 (b) This section may not be construed to automatically
13 preclude the individual from being:

14 (1) a policyholder or claimant under an insurance
15 policy;

16 (2) a grantee of a mortgage or similar instrument on
17 the individual's residence from a regulated entity if done under
18 customary terms and in the ordinary course of business;

19 (3) an investment owner in shares of regulated
20 diversified investment companies; or

21 (4) a settlor or beneficiary of a blind trust into
22 which any otherwise permissible holdings have been placed.

23 Sec. 751.253. ACCESS TO INFORMATION. (a) Except as
24 otherwise provided by law, market conduct surveillance personnel
25 shall, as practicable, have free and full access to all books and
26 records, and all employees, officers, and directors, of the insurer
27 during regular business hours.

1 (b) On the request of market conduct surveillance
2 personnel, an insurer that uses a third-party model or product for
3 any of the activities under examination shall make the details of
4 those models or products available to that personnel.

5 Sec. 751.254. AUTHORITY OF MARKET CONDUCT SURVEILLANCE
6 PERSONNEL. Market conduct surveillance personnel may issue
7 subpoenas and examine insurance company personnel under oath if
8 that action is ordered by the commissioner under Subchapter C,
9 Chapter 36.

10 [Sections 751.255-751.300 reserved for expansion]

11 SUBCHAPTER G. SANCTIONS

12 Sec. 751.301. SANCTIONS. (a) The commissioner may impose
13 sanctions under Chapter 82 against an insurer determined, as a
14 result of a market conduct action or other action under this
15 chapter, to have violated this code, a rule adopted under this code,
16 or another insurance law of this state.

17 (b) In determining an appropriate sanction under Subsection
18 (a) the commissioner shall consider:

19 (1) any actions taken by the insurer to maintain
20 membership in, and comply with the standards of, best-practice
21 organizations that promote high ethical standards of conduct in the
22 insurance marketplace; and

23 (2) the extent to which the insurer maintains
24 regulatory compliance programs to self-assess, self-report, and
25 remediate problems detected by the insurer.

26 SECTION 2. This Act takes effect September 1, 2005.