NO. 07-30482

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA,

Plaintiff-Appellant

v.

THE LOUISIANA DIVISION OF ADMINISTRATIVE LAW THROUGH ITS DIRECTOR, ANN WISE

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA,
CASE NO. 06-880-JUP-SCR

John V. Parker, United States District Judge

# NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS' BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL OF THE JUDGMENT BELOW

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**Plaintiff-Appellant**

**v.**

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**Defendant-Appellee**

## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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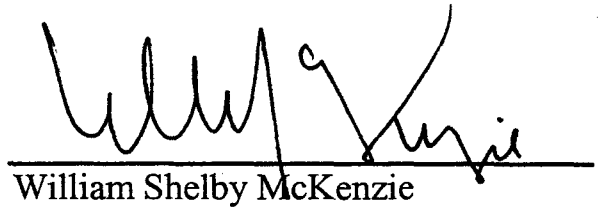

William Shelby McKenzie

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

### A. Identity of Amicus Curiae

Amicus curiae, the National Association of Insurance Commissioners ("NAIC"), is a Delaware non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Founded in 1871, it is the nation's oldest association of state government officials. The mission of the NAIC is:

> [t]o assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost effective manner, consistent with the wishes of its members: ***Protect the public interest; Promote competitive markets; Facilitate the fair and equitable treatment of insurance consumers; Promote the reliability, solvency and financial solidity of insurance institutions; and Support and improve state regulation of insurance.*** [1]

As a not-for-profit organization, the NAIC's purpose is to provide its members with a national forum for discussing common issues and interests and working cooperatively on regulatory matters transcending the boundaries of their own jurisdictions. Collectively, the commissioners work

[1] See National Association of Insurance Commissioners, NAIC Mission Statement, available at http://www.naic.org/index_about.htm (last visited September 6, 2007).

to develop model legislation, rules, regulations and white papers to coordinate regulatory policy. Their overriding objective is to protect consumers and assist in maintaining the financial stability of the insurance industry.

The NAIC performs numerous crucial services to assist its members in reaching their regulatory goals and to strengthen state regulation of insurance, including: the development and publication of model laws, regulations, bulletins, guidelines and financial and accounting standards; the coordination of quarterly national meetings and interim meetings of various NAIC committees, task forces and working groups; the creation and publication of white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*; the management of accreditation standards for, and coordination of, the review of insurance departments; the maintenance of financial and regulatory databases and regulatory analysis of insurance company financial data; the offering of education and training programs for state, federal and international financial regulators; and the operation of the Securities Valuation Office. Hundreds of state and federal laws assign duties to the NAIC and make reference to and incorporate NAIC standards, models and publications.

The NAIC has extensive experience with the interpretation and application of the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, ("McCarran-Ferguson") and various State laws, many of which are based on NAIC model laws, along with constitutional challenges and administrative law matters.

## B. INTEREST OF AMICUS CURIAE

The interest of the NAIC in this case arises out of the regulatory responsibility vested in state insurance regulatory officials authorized to regulate the business of insurance. This responsibility includes the authority to grant or deny certain convicted felons a waiver to participate in the business of insurance under 18 U.S.C. § 1033 ("§1033"). The insurance commissioners of the various states are charged by state and federal law with the responsibility of regulating the business of insurance within his or her jurisdiction pursuant to McCarran-Ferguson and state insurance laws. The NAIC, through its Antifraud Task Force, has promulgated uniform guidance on the granting of §1033 waivers.

Any member of the NAIC may request the filing of an amicus curiae brief. All such requests require approval by the NAIC's Executive Committee. At the request of NAIC member Plaintiff-Appellant, James J. Donelon, Commissioner of Insurance for the State of Louisiana ("Louisiana

Insurance Commissioner"), the NAIC Executive Committee has approved the filing of this amicus brief.

## II. STATEMENT OF THE CASE

The NAIC adopts the statement as set forth by the Plaintiff-Appellant James J. Donelon, Commissioner of Insurance for the State of Louisiana.

## III. SUMMARY OF ARGUMENT

18 U.S.C. § 1033 authorizes the Louisiana Insurance Commissioner, as the chief insurance regulatory official for the State of Louisiana, to issue waivers to certain convicted felons to participate in the business of insurance. The NAIC seeks to appear as amicus in this case to present to the Court the collective expertise of its members concerning §1033 waivers. Additionally, the NAIC joins the Louisiana Insurance Commissioner in his request that the issue before the District Court as to the Louisiana Insurance Commissioner's authority under §1033 be remanded to the Court to be heard.

The NAIC developed and issued *Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994: 18 United States Code Sections 1033 and 1034* ("*NAIC Guidelines*"). 4 Proc. of the Nat'l Ass'n of Ins. Comm'rs 1013-1028 (1997); 1 Proc. of the Nat'l Ass'n Ins. Comm'rs 939-954 (2002); 2 Proc.

Of the Nat'l Ass'n Ins. Comm'rs 1018-1020 (2002). A copy of the *NAIC Guidelines* are attached to this brief. The *NAIC Guidelines* provide that the Commissioner grants and denies §1033 waivers. The NAIC seeks to present these guidelines to the Court to assist in their review of Plaintiff-Appellant, Louisiana Insurance Commissioner's, appeal.

## IV. ARGUMENT

The NAIC joins in and supports the Louisiana Insurance Commissioner's arguments to this Court that the sovereign immunity doctrine has been inappropriately expanded by the District Court and used incorrectly to deny the Commissioner an opportunity to be heard on the underlying issues presented, specifically the important role that has been delegated by Congress to the Louisiana Insurance Commissioner under §1033..The NAIC agrees that discussion of the underlying merits is inappropriate at this stage of the proceedings; however the NAIC would ask the Court to direct its attention to the importance of this issue to state insurance regulators.

18 U.S.C. § 1033(e)(2) states that a person convicted of a felony for a crime of dishonesty and whose activities affect interstate commerce may not participate in the business of insurance without the written consent of an insurance regulatory official authorized to regulate the business of insurance.

This written consent is often referred to as a "§1033 waiver." The NAIC was instrumental in the development of §1033, having worked for several years for the adoption of this type of law. 4 Proc. of the Nat'l Ass'n of Ins. Comm'rs 1014 (1997). NAIC members were first-hand witnesses to the numerous problems attributable to fraud and bad actors in the insurance industry and sought a solution from the federal government. During the hearings prior to the adoption of §1033, Congress noted:

> The National Association of Insurance Commissioners ... have called on Congress for a Federal criminal statute to help insurance regulators deal with interstate insurance fraud schemes. [2]

The NAIC coordinated this effort with the House Committee on Energy and Commerce and several Congressmen to achieve the enactment of §1033. [3]

In the spirit of uniformity and a desire to uphold the intent of Congress, and to aid in the uniform interpretation of § 1033, the NAIC membership directed their attention and resources to the development of the §1033 *NAIC Guidelines*. The purpose of the *NAIC Guidelines* is to assist NAIC members in their review of §1033 waiver applications. The *NAIC Guidelines* provide a general overview of the concepts, principles and procedures to be used by federal prosecutors in §1033 prosecutions. In particular, the *NAIC*

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[2] H.R. REP. 103-468 (1994)

[3] *Id.*

*Guidelines* provide assistance and guidance to commissioners who receive §1033 waiver applications.[4] The *NAIC Guidelines* also provide certain suggestions to insurers in complying with §1033.

The *NAIC Guidelines* were adopted at the NAIC's Spring National Meeting in 1998. 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 10 (1998); 4 Proc. of the Nat'l Ass'n of Ins. Comm'rs 26 (1997). Prior to their adoption, the *NAIC Guidelines* were made available to the public. 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 861 (1997); 2 Proc. of the Nat'l Ass'n of Ins. Comm'rs 1538 (1997). NAIC members and interested parties were provided an opportunity to comment on the proposed *NAIC Guidelines*. *Id.* The NAIC considered the comments of all parties and the resulting *NAIC Guidelines* were a collaborative effort recognizing the impact on all interested parties in the interpretation of §1033.

In adopting the *NAIC Guidelines*, the NAIC provides a uniform approach to insurance regulators regarding granting or denying §1033 waivers. Since adopting the *NAIC Guidelines*, the NAIC has been recognized for its efforts to establish uniformity in this area. On March 6, 2001, Dennis Lormel, the Section Chief for the Financial Crimes Division of

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[4] The *NAIC Guidelines* state: "'[i]nsurance regulatory official' means commissioner, director or superintendent of insurance as the term is properly used in each state." 4 Proc. of the Nat'l Ass'n of Ins. Comm'rs 1016 (1997).

the Federal Bureau of Investigations, testified before Congress regarding criminal history records for persons participating in the business of insurance. During his testimony, Mr. Lormel praised the NAIC and its efforts on the *NAIC Guidelines*:

> Numerous States have policy and procedures in place to enforce 1033 based on the NAIC guidelines for state insurance regulators. We commend the NAIC for their proactive efforts and progress in seeking to establish uniformity throughout the industry. [5]

Collectively, the NAIC members have dedicated generous time and resources to address issues, duties and obligations regarding §1033 matters. The *NAIC Guidelines* are a reflection of the importance NAIC members have placed on §1033. The NAIC members appreciate the unusual delegation of authority by Congress through §1033. NAIC members regard §1033 and §1033 waivers as important tools at their disposal to protect their citizens. In order to continue to preserve and maintain these tools, the Louisiana Insurance Commissioner's Complaint should be allowed to proceed.

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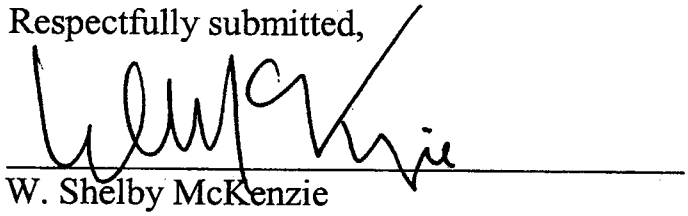
[5] See Federal Bureau of Investigations Congressional Testimony, available at http://www.fbi.gov/congress/congress01/lormel.htm (last visited September 6, 2007).

## V. CONCLUSION

The NAIC appears before this Court to urge remand of this case. Based on the critical importance of the issue presented, specifically the authority of the Louisiana Insurance Commissioner and all state insurance regulators to grant or deny §1033 waivers, the Court should allow the Louisiana Commissioner's original Complaint to proceed and not inappropriately expand the doctrine of sovereign immunity to bar a decision on the merits.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon the below listed counsel of record by placing the same in the U.S. Postal Service, with adequate postage affixed thereto, this 12 day of September, 2007:

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## CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), undersigned counsel certifies that this brief complies with type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5th Cir. R. 32.2.7(b)(3), this brief contains 1,650 words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Word 2003 software.

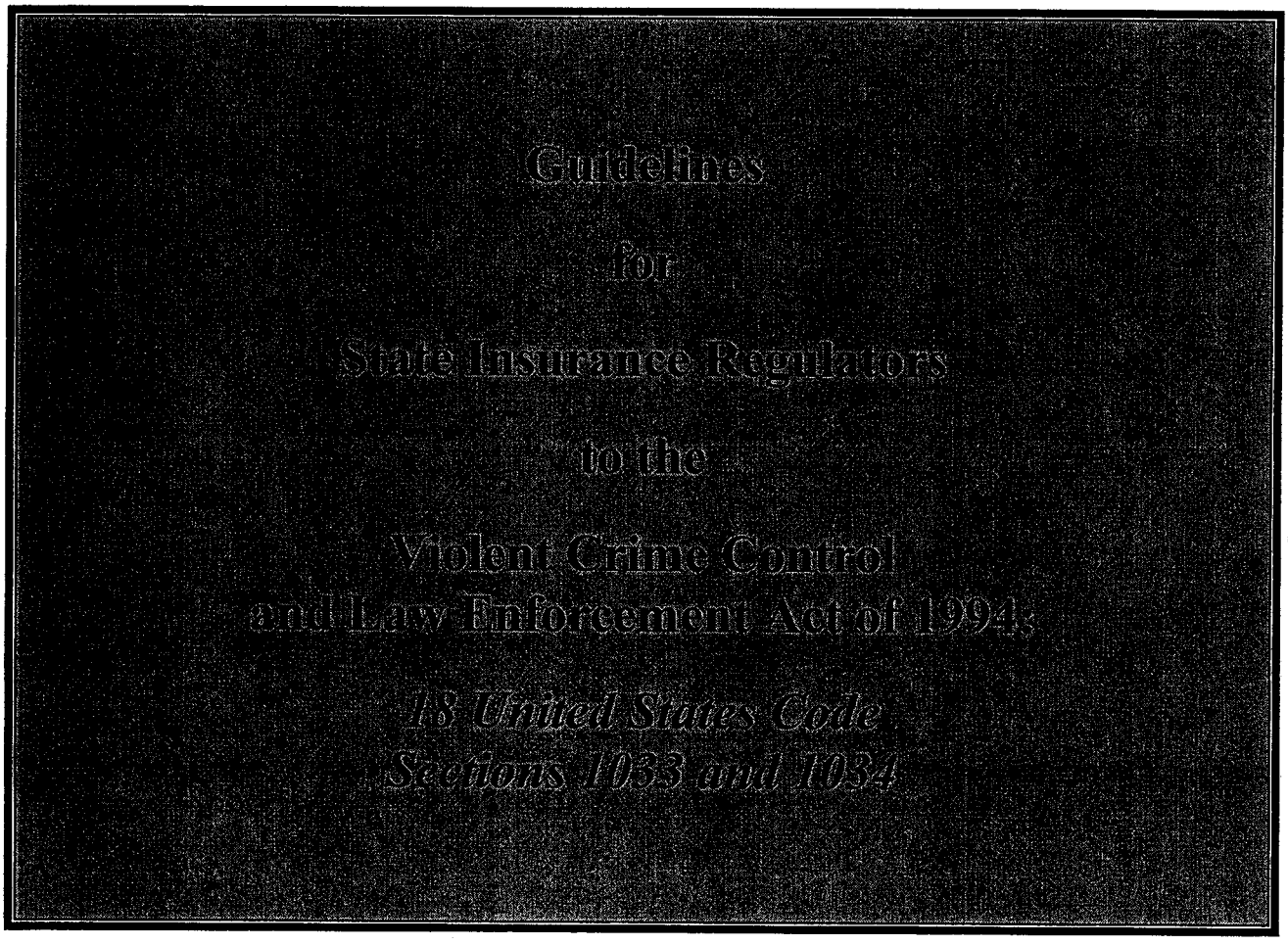
3. Undersigned counsel has provided an electronic version of this brief to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

September 12, 2007.

W. SHELBY MCKENZIE

**In accordance with FED. R. APP. P 32.1(b) and 5TH CIR. R. 28.7, the following Guidelines are not available on a publicly accessible electronic database and therefore a copy is being provided.**




*National Association of Insurance Commissioners*

*Adopted March 1998*

*Attachments E thru I added 2002*

## PURPOSE

The materials within this document, titled *Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994: 18 United States Code Sections 1033 and 1034, (herein referred to as Guidelines)* provide a general overview of the concepts, principles and procedures that the Antifraud (E) Task Force of the National Association of Insurance Commissioners (NAIC) believes will be of assistance to insurance commissioners and regulators regarding the anticipated use of the statutes by Federal prosecutors, and, more importantly, what obligations have been created for commissioners. Specifically, the Guidelines provide assistance to a commissioner who receives a request from a person prohibited from engaging or participating in the business of insurance (a person convicted of a State or Federal criminal felony involving a breach of trust or dishonesty) for written consent to allow that person to engage or participate in such business. The Guidelines also provide certain suggestions to insurers in complying with these statutes.

## DISCLAIMER

**Decisions whether to prosecute individuals and entities under 18 U.S.C. Sections 1033 and 1034 are solely within the discretion of the United States Department of Justice and the United States Attorney's Office.**

**These Guidelines do not constitute legal advice to any reader. The materials are not intended to serve as a definitive statement of the law or set forth the administrative or procedural requirements of any particular jurisdiction. The materials are not intended, and shall not be construed, as being binding on any particular insurance commissioner. The Guidelines may not be suitable or applicable for use in all situations.**

**While the Guidelines have been prepared at the request of the membership of the NAIC, the document does not reflect the formal position of the NAIC as an organization, any person, insurance regulatory authority or commissioner in the United States, the District of Columbia or the U.S. territories. Adoption of this document by the NAIC committee process was solely for the purpose of providing for publication and distribution of these materials to insurance commissioners and departmental staff.**

**Users of this document should consult the applicable Federal statutory provisions, appropriate judicial and regulatory cases and authorities, and experienced personnel or other professionals prior to utilizing the information and opinions contained herein. No Federal agency provided assistance to the Antifraud (E) Task Force regarding the applicability or soundness of the interpretations and opinions herein.**

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## A. INTRODUCTION

On September 13, 1994, President Clinton signed the omnibus anti-crime bill titled the "Violent Crime Control and Law Enforcement Act of 1994" (Public Law 103-322, H.R. 3355) (the "Act"). The Act included new Federal criminal and civil enforcement provisions aimed directly at white-collar and other insurance fraud. The NAIC had been proposing legislation like this to members of Congress since April 1991. The Act is very broad in application, even reaching to people and activities of reinsurers doing business in, or with, U.S. domiciled insurers.

The insurance fraud provisions of the Act are contained within two new sections to Title 18 of the United States Code. Section 1033 is captioned "Crimes By and Affecting Persons Engaged in the Business of Insurance Whose Activities Affect Interstate Commerce." The section enumerates certain activities as crimes if they are carried out by individuals, their agents and employees engaged in the business of insurance and whose activities affect interstate commerce.

Prohibited activities include:

- Knowingly, with the intent to deceive, making any false material statement or report or willfully and materially overvaluing any land, property or security in connection with any financial reports or documents presented to any insurance regulatory official or agency for the purpose of influencing the actions of that official or agency;

- Willfully embezzling, abstracting, purloining or misappropriating any of the moneys, funds, premiums, credits or other property of any person engaged in the business of insurance [includes individuals acting as, or being an officer, director, agent, or employee of that person];

- Knowingly making any false entry of material fact in any book, report or statement of the person engaged in the business of insurance with the intent to deceive any person about the financial condition or solvency of such business;

- By threats or force or by any threatening letter or communication, corruptly influencing, obstructing, or impeding or endeavoring to corruptly influence, obstruct, or impede the proper administration of the law under which any proceeding is pending before any insurance regulatory official or agency; and

- Willfully engaging in the business of insurance whose activities affect interstate commerce or participating in such business, if the individual has been convicted of a criminal felony involving dishonesty or a breach of trust or has been convicted of an offense under Section 1033. Further, other individuals shall not willfully permit the participation of an individual so convicted.

Punishments for engaging in the prohibited activities specified in Section 1033 range from a maximum of between one to 15 years of imprisonment plus fines established under Title 18. Under

 

certain provisions, penalties may be more severe if the activity jeopardized the safety and soundness of an insurer and was a significant cause of an insurer being placed into conservation, rehabilitation or liquidation.

"Insurer" is broadly defined to mean an entity whose business activity is the writing of insurance or the reinsuring of risks including any person who acts as, or is, an officer, director, agent or employee of that business entity. The term "business of insurance" is also broadly defined to mean the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary or incidental to such writing or reinsuring, and the activities of persons who act as, or are, officers, directors, agents or employees of insurers, or who are other persons authorized to act on behalf of these persons.

Section 1034 is captioned "Civil Penalties and Injunctions for Violations of Section 1033." The section allows the U.S. Attorney General to bring civil actions against a person who engages in conduct constituting an offense under Section 1033. If found to have committed the offense, the person is subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation the person received or offered for the prohibited conduct, whichever amount is greater. If the offense contributed to the decision of a court issuing an order directing the conservation, rehabilitation or liquidation of an insurer, the penalty is remitted to the appropriate regulatory official for the benefit of the troubled insurers' estate. Imposition of a civil penalty under Section 1034 does not preclude any other criminal or civil statutory, common law or administrative remedy available by law to the United States or any other person. The section also permits the Attorney General to seek an order (an injunction) prohibiting persons from engaging in any illegal conduct.

While the NAIC is committed to State regulation of insurance, it believes there is an important role for the Federal government to play in the area of law enforcement in partnership with State insurance departments and the NAIC. The NAIC originally proposed this type of Federal insurance fraud statute because of the power of the Federal government to bring additional jurisdictional, investigatory and law enforcement resources to bear in combating insurance fraud. State insurance departments have long been willing to investigate and prosecute insurance fraud in cooperation with Federal law enforcement agencies but had lacked a firm Federal statutory basis for doing so. Without a Federal law specifically referencing insurance fraud, States have had difficulty in turning to Federal prosecutors to assist them with certain groups of wrongdoers. However, with these new Federal criminal and civil statutes in place, coupled with the law enforcement and judicial authority of the United States behind them, States will now have new tools in their arsenal to combat insurance fraud activities. Federal statutes are viewed as enhancing, not superseding, State law enforcement and will help to serve as additional deterrence to and punishment of individuals who engage in illegal insurance activities.

The NAIC originally proposed and then strongly supported the passage of an insurance fraud statute by Congress. This role is in keeping with the efforts of the NAIC and State insurance departments to work cooperatively with the U.S. Department of Justice, U.S. Department of Labor, the Federal Bureau of Investigation, the Internal Revenue Service and other Federal law enforcement agencies. Because the statutes involve new responsibilities for State insurance regulators, the Federal/State Coordinating Working Group of the Antifraud (E) Task Force was charged with providing a resource guide to insurance commissioners and regulators regarding the potential use of the statutes by

 

Federal prosecutors and more importantly, what obligations have been created for commissioners. Specifically, the Guidelines provide advice to a commissioner who is asked by a prohibited individual (a person convicted of a State or Federal criminal felony involving a breach of trust or dishonesty) for written consent to allow that person to engage or participate in the business of insurance.

It is important to know that there are other Federal statutes making it a felony crime for individuals to engage in certain otherwise lawful activities after being convicted of a crime. For example, a collateral consequence to a person being convicted of certain crimes described in 29 U.S.C. Sections 504 and 1111 is the prohibition of that person from service and employment with labor unions, employer associations, employee pension and welfare benefit plans, and labor relations consultants in the private sector. [1] Another Federal statute making it a crime to engage in certain activities, arises from the banking industry as provided for in the Federal Deposit Insurance Corporation Act. *See* 12 U.S.C. § 1818(g). However, under these Federal statutes, there is a legal process available whereby otherwise barred individuals may apply to appropriate officials, under defined procedures, for a waiver from the prohibition.

As an aside, considering today's increasingly integrated insurance marketplace, it is theoretically possible for a prohibited individual to have need of securing written consent under all three of these Federal statutory schemes in order to engage in the business of insurance. For example, if a prohibited individual were to seek employment as an insurance agent in a bank offering services to an employee pension and welfare benefit plan, the individual would need consent from an appropriate Federal court judge, the Federal Deposit Insurance Corporation and one or more State insurance commissioners. Researching how Federal prosecutors and courts have interpreted the earlier enacted statutory schemes is illustrative, although not binding, on how the prosecutors may react to 18 U.S.C. Sections 1033 and 1034.

A copy of 18 U.S.C. Sections 1033 and 1034 has been placed in Attachment A. Readers should conduct a thorough review of the statutes before continuing with the provisions below.

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[1] 29 U.S.C § 1111(a) prohibits a person from service or employment as:
(1) an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative in any capacity of any employee benefit plan.
(2) a consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan, or
(3) in any capacity that involves decision-making authority or custody or control of the moneys, funds, assets or property of any employee benefit plan.

 

## B. 18 U.S.C. SECTION 1033(E) IMPOSES CERTAIN OBLIGATIONS UPON INSURANCE COMMISSIONERS

### 1. GENERAL DISCUSSION

Section 1033(e)(1)(A) makes it a felony crime for a person to engage or participate in the business of insurance if that person has ever been convicted of a State or Federal felony crime involving dishonesty or a breach of trust (or of a crime under 18 U.S.C. Section 1033). The purpose of this subsection is to prohibit anyone convicted of a felony crime involving trustworthiness from conducting insurance activities. The statute operates as a bar to these individuals from participating in otherwise legal activities. In effect, the law prohibits certain felons from ever working in the business of insurance unless they secure written consent.

The prohibition went into effect on September 13, 1994. While *the statute is not retroactive in its application*, from that date forward it became illegal for certain individuals to either: (1) begin to work in the business of insurance, or (2) continue to work in the business of insurance. Thus, it is applicable to all prospective employees and present employees of insurers, where "employee" means any person working for an insurer, whether directly or indirectly.[2] There appears to be no limitation or restrictions on the applicability of Sections 1033 and 1034 as to which persons are covered so long as those persons are engaged in, or participate in, the "business of insurance" – a term broadly defined by Section 1033. The statutes contain no grandfather clause for persons already working in the business of insurance.

Section 1033(e)(1)(B) makes it a felony crime for a company or person, who is engaged in the business of insurance, to willfully permit the participation of a person who is prohibited under Section 1033(e)(1)(A). Thus, the statute makes it illegal for an insurer, reinsurer, its officers, directors, employees, agents and brokers (or others) to willfully employ a person who has been convicted of a felony crime involving dishonesty or a breach of trust. The law also makes it a crime for any of these employers or their subcontractors to continue to employ an individual if the employer or subcontractor subsequently learns of a conviction and does not immediately terminate the individual.

As to what constitutes "insurance activities," the statute includes "all acts necessary or incidental to" the writing of insurance or the reinsuring of risks and the "activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons."[3] This latter group of "other persons" appears to include any subcontractors, third-party administrators, consultants, professionals and the like.

Finally, as to the identification of the "individuals" who qualify as the persons or entities with whom prohibited persons may not participate with [or work with], the statute is very broad in its scope.[4]

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2 The term "working" is used to generally describe activities that are defined in more detail in later sections of the *Guidelines*.

3 *See,* 18 U.S.C. 1033(f)(1).

4 *See,* 18 U.S.C. 1033(e)(1)(B).

The universe of these "individuals" includes insurers and reinsurers, and all of the persons who are authorized to act on their behalf as set out in the prior paragraph. From this point forward, when the term "insurer" is used, it means to include this entire universe of individuals. *See,* 18 U.S.C. § 1033(f)(2).

If an individual is a "prohibited person" under this Act, the only way for that person to engage or participate in the business of insurance is to obtain the "written consent" of the appropriate insurance commissioner.

## 2. PROHIBITED INDIVIDUALS MAY OBTAIN RELIEF

Section 1033 provides a mechanism whereby a prohibited individual may apply to the appropriate insurance commissioner for "written consent" to work in the business of insurance. *It is important to point out that this mechanism does not allow a person to work in the business of insurance while that person is applying for relief from the prohibition.* The statutory language for the mechanism underlined below in 18 U.S.C Section 1033(e) and (f) provides meaningful definitions:

(A) 18 U.S.C. Section 1033(e)

(e)(1)(A) Any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business, shall be fined as provided in this title or imprisoned not more than 5 years, or both. (emphasis added)

(B) Any individual who is engaged in the business of insurance whose activities affect interstate commerce and who willfully permits the participation described in subparagraph (1) shall be fined as provided in this title or imprisoned not more than 5 years, or both.

(2) A person described in paragraph (e)(1)(A) may engage in the business of insurance or participate in such business if such person has the written consent of any insurance regulatory official authorized to regulate the insurer, which consent specifically refers to this subsection. (emphasis added)

 

(B) 18 U.S.C. Section 1033(f)

As used in this section—

(1) the term "business of insurance" means—
  (a) the writing of insurance, or
  (b) the reinsuring of risks, by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons;

(2) the term "insurer" means any entity the business activity of which is the writing of insurance or the reinsuring of risks, and includes any person who acts as, or is, an officer, director, agent, or employee of that business;

(3) the term "interstate commerce" means—
  (a) commerce within the District of Columbia, or any territory or possession of the United States;
  (b) all commerce between any point in the State, territory, possession, or the District of Columbia and any point outside thereof;
  (c) all commerce between points within the same State through any place outside such State; or
  (d) all other commerce over which the United States has jurisdiction; and

(4) the term "State" includes any State, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands.

## 3. LEGISLATIVE HISTORY AND COURT DECISIONS

While the legislative history of the Violent Crime Control and Law Enforcement Act of 1994 is voluminous, very little of it applies to 18 U.S.C. Sections 1033 and 1034. See 1994 U.S. Code, Cong. & Admin. News 1801. The few references to these sections in the history provide little assistance in interpreting its provisions. As of the date of these materials, there were no court decisions interpreting either 1033 or 1034. Copies of three documents most relevant to the statute's legislative history are contained in Attachment D.

## 4. RELEVANT TERMS

(A) Terms defined in Section 1033:
"Business of insurance", "insurer," "interstate commerce" and "state" are defined terms in the statute. The definitions appear above in Section B2, titled, Prohibited Individuals May Obtain Relief.

 

(B) Terms contained in but not defined in Section 1033. The working group has assigned plain and ordinary meanings to the following terms:

(1) "Insurance regulatory official" means commissioner, director or superintendent of insurance as the term is properly used in each state.

(2) "Convicted"

(a) Federal Law. Convicted is defined in Federal law at 29 U.S.C. § 504(c)(1) and 29 U.S.C. § 1111(c)(1) and means that a person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal. However, it appears that under Federal law, a person who is sentenced to some sort of *deferred adjudication status* may not be deemed to be "convicted" for purposes of these statutes and thus would not be a prohibited person. Although a deferred adjudication arises only after a finding of guilt, the Federal judicial system generally views a person in a deferred adjudication status as still *under indictment* and thus not convicted.

(b) State Law. State laws may contain similar definitions for the term "convicted" and may well impose deferred adjudication sentences similar to the Federal system. Thus, when determining whether an individual convicted under State law is a prohibited person, one should research the law of the State in which the person was tried, comparing the type of sentence received to the definition for convicted and whether it is affected by any type of deferred adjudication status.

While not discussed in more detail in these Guidelines, the granting of a State and/or Presidential pardon may affect whether an individual is a prohibited person under these statutes. When confronted with an applicant who has received a pardon, commissioners should consult applicable State or Federal law to determine its impact.

(3) "Crime involving dishonesty or a breach of trust" is discussed in Section B7a.

(4) "Participate in such business" is discussed in Section B5a.

(5) "Willfully" is discussed in Section B7b.

 

## 5. Discussion of Issues Arising From the Statute

Discussed below are certain issues of concern regarding the interpretation and enforcement of Section 1033(e):

(A) Responsibilities of insurers and others to identify prohibited persons.

Insurance companies, reinsurers, agents and all other types of entities engaged or participating in the business of insurance as defined in these Federal statutes should attempt to identify if any present employees or prospective employees have been convicted of one or more criminal felonies.[5] If the insurer is made aware of a felony conviction, it must then make a determination whether that felony involved dishonesty or a breach of trust.

If there is a determination that the felony conviction in fact involves dishonesty or a breach of trust, the next question is whether that person is engaged in the business of insurance whose activities affect interstate commerce. *Readers should again note that ultimately only a Federal prosecutor or court will determine how restrictive or broad to interpret and apply the definition of the business of insurance contained in these statutes.* However, the definition appears of its face to be extremely broad and inclusive of almost all insurance activities.

Then, if a determination is made that a person has been convicted of a felony crime of dishonesty or breach of trust, and that person wants to engage, or is engaged, in the business of insurance, that person must refrain from conducting any insurance activities until such time as he or she has obtained "written consent" from the appropriate commissioner. Until that time, the person is a "prohibited person." The burden to apply for "written consent" is on the prohibited person, in cooperation with the insurer for whom the insurance activities would be performed.[6]

While the statute does not appear to distinguish between individuals or employees as to their positions and whether those positions include any significant authority or responsibility, there are some positions that are not directly involved in the transaction of insurance business and the statutes could be read as not covering these persons. However, as noted above, Federal prosecutors and the courts will ultimately determine who may be prohibited from transacting business due to felony convictions.

Section 1033(e)(1)(A) contains a distinction between "willfully engages in the business of insurance" versus "participates in such business." The rules of statutory construction require that a distinct meaning be found for each of the phrases. The second phase usually modifies or adds to the first phrase. *Webster's II, New Riverside*

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[5] From this point forward, the term "insurer" will be used to describe all of these insurance entities. *See*, 18 U.S.C. § 1033(f)(2).

[6] A prohibited person must apply for "written consent of any insurance regulatory official authorized to regulate the insurer, which consent specifically refers to this subsection." 18 U.S.C. § 1033(e)(2).

*University Dictionary* (1994), defines "participate" as meaning "to join or share with others: take part," or "to share in: partake of." The second phrase was added to expand the definition, for example, to the owners of insurers, or consultants, who actively oversee the activities of a company but are not technically an officer, director, employee or agent of that company. It may also include others who receive compensation or remuneration from such business.

Section 1033(e)(1)(A) applies only to "activities involving interstate commerce." Interstate commerce is a defined term. *See,* 18 U.S.C. 1033 (f)(3). The definition in the statute appears to be so broad that after much discussion, the working group could not anticipate any examples of activities that would not be covered.

Insurers, who under these statutes have an obligation not to willfully permit such an individual to engage or participate in the business of insurance, should take steps to identify these individuals on a prospective basis. Regarding present employees, some insurers may have personnel records that contain evidence of past felony convictions relevant to these statutes. Officers and directors may have been verbally told of past criminal activity of employees and agents. The cost and effort to search through materials of this type, together with interviews of people who may know of such conduct, might be labor intensive and cost prohibitive. It is safe to assume that over the years, many individuals have been given a chance to put their past behind them and become employed in the business of insurance. However, these statutes make no exception for these individuals. *They are all prohibited persons.*

One possible way for insurers to avert such a burdensome identification effort would be to aggressively implement a program whereby they ask for a written certification from both current and prospective employees.

A certification should be required immediately prior to employing a person at any level within an organization or before a business relationship is formed with any of the "other persons" covered by these statutes. The certification should state whether the person has ever been convicted of a State or Federal felony and should not be limited to disclosure of only "crimes of dishonesty or breach of trust." Disclosure limited to only such crimes will not be a defense to a prosecution under these statutes just because a person states that they did not know that their felony conviction was one involving a "crime of dishonesty or breach of trust." The better question to ask is whether a person has very been convicted of a felony.

As these Guidelines have discussed in detail, only a legal analysis will determine whether a crime involves dishonesty or a breach of trust. Insurers should require all individuals working for them, or with whom they have a business relationship of the type covered by the statutes, to notify the insurer in writing of a felony within 30 days of conviction.

Other suggested methods insurers might use to protect themselves would be to conduct criminal checks on individuals who are or may be placed into positions whereby the individual's activities potentially pose a substantial threat or risk to—a) its safety and financial soundness, or b) an insurance consumer.

(B) Authority to grant written consent to engage or participate in the business of insurance.

Numerous questions arise concerning the application of this provision. Which commissioner has primary (or sole) authority to consider a request for written consent pursuant to 18 U.S.C. Section 1033(e)(2)—the State where:

(1) the insurer is domiciled,
(2) the applicant's State of residence, if the applicant's activities will also simultaneous require the issuance of a "resident license,"
(3) the applicant will work, if different from the insurer's State of domicile,
(4) the felony conviction occurred, or
(5) the insurer possesses a foreign certificate of authority?

It appears to be industry's position that "written consent" can be obtained in any jurisdiction where the insurer is authorized to conduct business—that is, in any jurisdiction in which the insurer possesses a domestic or foreign certificate of authority. This issue may not be as difficult when determining where an agent who is licensed in only one State should be applying; however, it is much more difficult when the prohibited persons' activities affects numerous states, such as an officer or director of the insurer.

While the working group appreciates the industry's viewpoint, most members felt that it could not have been the intent of Congress to allow one State to extend its statutory power into other jurisdictions or to bind Federal prosecutors from initiating actions against prohibited persons who are conducting insurance business in various jurisdictions. A number of other legal authorities expressed opinions that regardless of what one would like to see in a partially ambiguous law, criminal statutes are narrowly construed in favor of defendants.

Regardless of the debate, the statute appears to permit a prohibited person to obtain one grant of written consent from the appropriate commissioner in order to engage or participate in the business of insurance, as opposed to securing consent from every jurisdiction in which they desire to conduct insurance activities. However, the statutes are ambiguous as to identifying who is the appropriate regulatory insurance official (commissioner) to apply to for written consent.

 

(C) Methodology to determine who is the "appropriate regulatory insurance official."

The working group has devised a "Standards of Review" methodology whereby only one commissioner is identified as the appropriate "insurance regulatory official." If accepted by the commissioners of all the NAIC members, this method will direct applications for written consent to the commissioner with the most regulatory interest over the prohibited person's insurance activities. This method includes first determining jurisdiction, and if found, considering the merits of the application. When this method is followed, it will assure that the prohibited person will be required to apply to a particular commissioner for written consent, and at the same time, prevent such person from forum shopping.

Commissioners will need only to consider an application from a prohibited person (hereinafter referred to as "applicant") who will,

(1) work as a full-time employee for a domestic insurance company,

(2) work as a resident licensee, or,

(3) work "substantially" for either a domestic insurance company or resident licensee.

All other applications need not qualify for consideration and the applicant can be directed to the appropriate NAIC member.

The recommended method also assures that certain other threshold decisions will be made before considering an application on the merits, such as, whether the applicant is an "individual" subject to 18 U.S.C.§ 1033, and, identification of the class of persons who are actually prohibited from engaging or participating in the business of insurance. It is possible that an individual may have submitted an application in good faith when in fact he or she is not a prohibited person.

(D) Standards of Review.

(1) Jurisdictional Prerequisites.
An application for "written consent" should not be considered unless the commissioner is satisfied that:

(a) the commissioner is authorized to regulate the insurer for whom the applicant will engage or participate with in the business of insurance;

(b) the applicant:
(i) will engage in and maintain an employer-employee, owner or director type relationship with an insurance company domiciled within this State, wherein the applicant will not need subsequent licensure as

a resident by the commissioner (e.g., a home or branch office employee residing anywhere; officers; directors); or

(ii) is a legal resident of the commissioner's State and will also simultaneous need a "resident license" to perform the insurance activities; or

(iii) fails to meet the criteria for either (i) or (ii) above, but whose insurance activities will be substantially performed as an "agent-servant" or "independent contractor" for either, an insurance company domiciled within this State, or, an entity or person who possesses a "resident license" granted by the commissioner of this State.

(c) the applicant is an individual who:

(i) has been convicted of any criminal felony involving dishonesty or a breach of trust, or,

(ii) has been convicted of an offense under Section 1033, and,

(iii) is desirous of engaging or participating in the business of insurance, and,

(iv) wherein his or her activities will affect interstate commerce.

(2) Consideration on the Merits.

If the jurisdictional prerequisites have been met, the following should be considered on a review of the merits:

(a) the applicant has been fully rehabilitated and no longer poses a risk or threat to insurance consumers or the insurer; and

(b) the issuance of written consent to the applicant is consistent with the public interest, Federal and State law and any applicable court orders.

(3) Guidelines and procedures should be developed to assist commissioners in ensuring that companies and individuals engaging or participating in the business of insurance are complying with the statute.

The working group is convinced that the focus of the application process should be to determine whether the activities the applicant will engage or participate in, constitute a risk or threat to insurance consumers or the insurer, and whether issuance of written consent is consistent with public interest and/or Federal and State law.

(E) Burden of Proof.

The burden of persuasion and evidence for going forward with a request for written consent (herein referred to as an "application") is on the prohibited person seeking the relief. Such a person has no matter of right to receipt of written consent, nor does any State's presumptive rehabilitation laws apply to consideration by the commissioner. Study of other similar Federal statutes makes this clear.

(F) Suggested Administrative Practices and Procedures.

(1) Application Process.

All applications and supporting documents received by the commissioner should be reviewed for completeness, and if found to be in compliance with this application process and the procedures established by the commissioner, the commissioner should accept them for filing. ***However, if the commissioner determines that the applicant fails to meet the Jurisdictional Prerequisites criteria in Section B5d above, the application should not be considered and be returned to the applicant.***

(2) Deficiencies in the application.

After an application has been submitted to the appropriate commissioner, the applicant and/or his legal representative should be notified by the commissioner of any deficiency in the application and supporting documents. The amount of time allowed for deficiencies to be remedied should be specified in the notice. In the event the deficiencies are not remedied within the specified period or any extension thereof granted after application to the commissioner in writing within the specified period, the application should be deemed to have been withdrawn and notice thereof given to applicant. Incomplete or deficient applications and supporting documents should not be deemed to be filed until determined to be complete by the commissioner.

(3) Notification to all other NAIC members.

Upon receipt of an application, the commissioner should notify all other members of the NAIC that an application for written consent has been filed together with a brief statement revealing the name, address, social security number, and types of insurance activities to be conducted by the applicant. Commissioners are urged to use the NAIC E-Mail system to make this notification.

It is hoped that any commissioner who has relevant information regarding the fitness of the applicant to receive written consent will immediately respond back with that adverse information. It is recommended that the application not be acted on until other NAIC members have had at least thirty (30) days from the date notice was sent to them to comment on the application.

 

Following a decision whether to grant or deny written consent, it is also hoped that the commissioner will again notify all other NAIC members of the decision by E-Mail and place an entry noting the decision into the appropriate NAIC database. Information regarding the granting or denial of written consent will be of great value to State licensing and administrative authorities.

(4) Investigative resources available.
After determining the application is complete and that all jurisdictional prerequisites have been met, the commissioner should conduct an investigation of the applicant using the NAIC databases including, but not limited to, the Regulatory Information Retrieval System (RIRS), the Producer Database, the Complaint Database and the Special Activities Database (SAD).

(5) Examples of administrative practices and procedures.
While every State has its own code of administrative practices and procedures, the working group recommends that each State review that code to ensure that it adequately addresses how to handle and process an application for written consent. If a State's administrative practices and procedures do not properly address this type of request, the following are examples that might be used:

(a) Expedited form of application process.
The commissioner may want to establish the use of an "initial" application form in order to determine whether to grant written consent in an expedited manner to a prohibited person whose insurance activities *do not on their face constitute* a risk or threat to insurance consumers or to the insurer. *It is important to note, however, that regardless of the procedures established by a commissioner to review an application, that once written consent is granted, that person is no longer prohibited from the business of insurance, subject to whatever conditions or limitations the commissioner has provided for in the consent; and that written consent could bar prosecution under this Federal statute in all jurisdictions.*

The initial application should elicit enough information for the commissioner to make a determination as to the specific insurance activities of the applicant and that the applicant is rehabilitated and does not constitute a risk or threat to insurance consumers or the insurer. If the commissioner decides the applicant's insurance activities are of the type to pose a risk or threat, the commissioner should additionally require completion of the "standard" application form described later in this section.

 

(b) Contents of the initial application.

(i) The initial application should contain the proposed job description and insurance activities of the applicant together with other pertinent questions. The initial application should be supported by an affidavit from the insurer's president (or his/her lawfully delegated designee) that states that: the applicant will in fact only perform those insurance activities as fully described in the application; the application is to the best of his/her ability, true and correct; and the applicant will not be placed into a position to where the persons activities will constitute a risk or threat to insurance consumers or the insurer. Commissioners may desire to include the following questions in an initial application form that should be affirmed or sworn to under oath by the applicant:

(ii) The name, address and social security number of the applicant and any other names and social security numbers used by the applicant and dates of such use; together with the complete name and location of the insurer, or its agent, for whom insurance activities will be performed.

(iii) A description of the nature, duties and activities of the office, position, occupation, trade, vocation or profession, for which the issuance of written consent is sought. Attach any written agreements or contracts to be entered into with the insurer or its agent.

(iv) Present employment or business activities, including office or offices held, with a description of the duties and activities thereof.

(v) A statement of the details regarding all felony convictions that appear to prohibit the applicant from engaging in the business of insurance as defined in 18 U.S.C. Section 1033, including but not limited to, the date of the offense or offenses which lead to the applicant becoming a prohibited person, the age of the applicant on such date and the time that has since elapsed.

(vi) The bearing, if any, the criminal offense or offenses will have on the applicant's fitness or ability to perform one or more such duties, activities or responsibilities as presented in the application.

(vii) Whether the applicant has made full payment of outstanding court costs, supervision, fees, fines and restitution concerning the offense or offenses.

 

(viii) Whether the applicant has received a full pardon or other type of pardon to the offense or offenses.

(ix) Whether there exists any evidence of mitigation or extenuating circumstances surrounding the applicant's commission of the offense or offenses.

(x) What evidence exists of the applicant's rehabilitation.

(xi) Professional licenses held, at the present time or at any time in the past, relating to the business of insurance, including, but not limited to, being a producer, agent, broker, solicitor, third-party administrator. If so licensed, whether the applicant has ever had a consumer complaint, administrative or other legal proceeding filed against him or her regarding his or her insurance activities, and whether as a result, has ever had such a license suspended, revoked or otherwise administratively sanctioned.

## 6. GRANTING OF WRITTEN CONSENT BY THE COMMISSIONER

Once the commissioner decides to grant written consent based upon the initial application and the supporting affidavit, the commissioner may issue written consent for that person to engage in the business of insurance or participate in such business, *which consent specifically refers to 18 U.S.C. Section 1033(e)(2).* The consent should also state that it is conditioned upon the truth and veracity of facts disclosed by the applicant in his or her application. The written consent should also be made conditional upon the applicant remaining in the approved position with its associated insurance activities considered not to be a risk or threat to insurance consumers or the insurer. Any other restrictions on the consent should be expressly noted as a condition of the receipt of the written consent. If the commissioner determines that the applicant fails any of the Standards of Review after consideration on the merits, written consent should be denied in writing and the applicant informed of any available appeal rights.

(A) Standard form of application process.

If the expedited form of application process is utilized by the commissioner, and based upon the initial application, it has been determined that the applicant's insurance activities are of the type to pose a risk or threat to insurance consumers or to the insurer, then an additional "standard" application form with more specific information should be requested.

This additional information need not overlap with the initial application but merely supplements it. This additional information is suggested as a means to delve more deeply into the life and affairs of the applicant prior to the commissioner's consideration of the request on the merits.

**However, if the commissioner elects to establish a procedure where only one application is to be requested from an applicant, then the substance of the "initial" application and the "standard" application could be combined.**

(B) Contents of the standard application.

The prohibited person applying for written consent should be required to answer the following questions in a "standard" application form that is affirmed or sworn to under oath by the applicant, in addition to those already attested to in the initial application form:

(1) Place and date of birth. If the applicant was not born in the United States, the time of first entry and port of entry, whether he or she is a citizen of the United States, and if naturalized, when, where and how he or she became naturalized. The number of the Certificate of Naturalization must be provided.

(2) Extent of education, including names and addresses of all schools attended.

(3) History of marital and family status, including a statement as to whether any relatives by blood or marriage are currently serving in any capacity with any insurer.

(4) History of employment and business associations, including any military service, in chronological order.

(5) A life-long listing by date and place of all arrests, convictions for felonies, misdemeanors, or offenses and all imprisonment or jail terms resulting there from, together with a statement of the circumstances of each violation which led to arrest or conviction.

(6) Whether applicant was ever on probation or parole, and if so the names of the courts by which convicted and the dates of conviction.

(7) Names and locations of all insurers for which the applicant has advised, represented, or in any manner worked for, concerning the writing of insurance, the reinsuring of risks, by an insurer , including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons, together which a description of the activities performed for each such insurer.

(8) A statement of applicant's net worth, including all assets held by the applicant, or held in the names of others for the applicant, the amount of each liability owed by the applicant or by the applicant, together with any person and the amount and

 

sources of all income during the immediately preceding 10 calendar years plus income to date of application.

(9) Whether any citizenship rights were revoked as a result of conviction or imprisonment, and if so the name of the court and date of judgment thereof and the extent to which such rights have been restored.

(10) A full explanation of the reasons or grounds relied upon to establish that the applicant's insurance activities for which written consent is sought will not be contrary to the intent and purposes of 18 U.S.C. Section 1033, and thus will not pose a risk or threat to insurance consumers or the insurer.

(11) A statement that the applicant does not, for the purpose of this request, contest the validity of any felony conviction upon which the request would be granted.

(12) Whether the applicant has ever applied for written consent from any other commissioner, and if so, the outcome in that proceeding.

(13) Any other information that the applicant believes will assist the Commissioner in making a determination whether to grant written consent.

(C) Character endorsements.

Each standard application should be accompanied by letters (or other forms of statement) addressed to the commissioner, attesting to the character and reputation of the applicant. The statement as to character should indicate the length of time the writer has known the applicant, and should describe applicant's character traits as they relate to the employment, position or activities for which written consent is sought and the duties and responsibilities thereof. The statement as to reputation should attest to applicant's reputation in his community or in his circle of business or social acquaintances. Each statement should indicate that it has been submitted in compliance with these procedures and that the applicant has informed the writer of the factual basis of the application being filed with the commissioner and purpose thereof. The commissioner may wish to lessen the importance of statements from relatives by blood or marriage, prospective employers or insurance related business entities, or persons serving in any capacity with the insurer, its employees or agents.

(D) Request for additional information.

The procedure should provide a means whereby the commissioner can require the applicant to submit such additional information as the commissioner deems appropriate for the proper consideration and disposition of an applicant's request for written consent.

 

(E) Granting of Written Consent by the Commissioner.

Upon review of the all the evidence and prior to a decision, it is recommended that the following supplemental factors be considered by the commissioner as a part of his or her deliberations:

(1) The legitimate interest of the insurance commissioner or the insurer for whom the activities would be performed in protecting property, and the safety and welfare of specific individuals, businesses or the general public.

(2) Whether the applicant or someone on his or her behalf has made a materially false or misleading statement or omission in the application process.

(3) The nature of the circumstances surrounding, and the seriousness of, the offense or offenses, and whether any pre-sentencing reports contain any information related to same.

(4) Whether the applicant has been charged with, indicted or convicted of multiple criminal offenses.

(5) What evidence exists of the applicant's rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have or have had the applicant under their supervision (e.g. – letters of recommendation from prosecutors, law enforcement, or correctional officers who have, respectively, prosecuted, arrested or had custodial responsibility for the applicant; and; letters of recommendation from the sheriff or chief of police in the community where the applicant resides or has resided).

(6) Whether all NAIC members were timely notified of the applicant's request for written consent, together with any relevant information regarding the fitness of the applicant received back from other NAIC members.

(F) Finally, the statute requires that if the commissioner chooses to grant written consent for the prohibited person to engage or participate in the business of insurance, that *the consent must specifically refers to 18 U.S.C. Section 1033(e)(2).* The consent should also state that it is conditioned upon the truth and veracity of facts disclosed by that person in his or her application. The written consent should also be made conditional upon the applicant remaining in the approved position with its associated insurance activities wherein the applicant is not considered to be a risk or threat to insurance consumers or the insurer. Any other restrictions on the consent should be expressly noted as a condition of the receipt of the written consent. If the commissioner determines that the applicant fails any of the Standards of Review after consideration on the merits, written consent should be denied in writing and the applicant informed of any available appeal rights.

## 7. Discussion of Undefined Terms in the Statutes

(A) "Criminal felony involving dishonesty or breach of trust."
The statute does not identify felonies that involve dishonesty or breach of trust. Identical language appears in several Federal statutes, including provisions relating to Federally insured banks, savings and loans, and credit unions, the farm credit system, small business investment companies, and the rural business investment fund. There does not appear to be at this time any court decisions outlining standards for determining which crimes involve dishonesty or breach of trust in the context of either Section 1033 or 1034.

However, for purposes of analysis under Section 1033, one must consider whether the felony conviction arose under a Federal statute or a State statute. Determining whether a Federal crime is one involving dishonesty or breach of trust must be analyzed under Federal law and cases. Determining whether a State crime is one involving dishonesty or breach of trust must be analyzed under both State and Federal law and cases.

Federal courts seem to apply a "you know it when you see it" test. *See, e.g., FDIC v. Mallen,* 661 F. Supp. 1003, 1006 (N.D. Iowa 1987) [holding that the crime of making a false statement or entry to a Federal agency is obviously one of "dishonesty or breach of trust" within the meaning of the Federal Deposit Insurance Act]. In *Feinberg v. FDIC,* 420 F.Supp. 109, 116 (D.D.C. 1976), the court held that the determination of whether a crime involves "dishonesty or breach of trust" under the Federal Deposit Insurance Act, a statute containing language identical to 18 U.S.C. § 1033, rests with the FDIC. In *Feinberg* at 116-17, the court said:

> [The Act], by its very language, requires that the agency decide whether the crime charged is one "involving dishonesty or breach of trust." [Footnote omitted]. Given the variety and nature of State offenses, it is apparent that the agency must exercise discretion as to this issue. This discretion, in fact, is enhanced by the lack in the statute of a definition of a crime of "dishonesty or breach of trust."

Each State insurance department could, following the instruction of the Feinberg court, exercise its administrative powers in reaching a determination that a particular felony conviction involved dishonesty or a breach of trust within the meaning of the Federal act. Unless such agency determination is arbitrary or capricious, under the general rules of judicial review of administrative determinations, a reviewing court will give deference to an administrative agency's determination.

More illuminating are cases decided under Federal Rule of Evidence 609(a)(2), which provides that, for the purpose of attacking the credibility of a witness, "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." The Conference Committee report

on Rule 609 describes what Congress meant by the phrase "dishonesty or false statement:"

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

Notes of Conference Committee, H. Rep. No. 93-1597.

In 1990, Congress considered amending Rule 609 to provide a clearer definition of "dishonesty or false statement." It opted not to do so. In the notes regarding the 1990 proposed amendments, the committee wrote:

> The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that take an unduly broad view of "dishonesty," admitting convictions such as for bank robbery or bank larceny.

Apparently, Congress intended Rule 609 to render admissible only those prior convictions which impact upon a witness' credibility. The commission of "perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating or breach of trust) will usually have a very material relevance" to the credibility of a witness. *United States v. Bartlett*, No. CV-92-2448, 1993 WL 372267 (E.D.N.Y. Sept. 9, 1993). On the other hand, crimes that do not involve an element of deceit do not fall within the Rule. Courts have repeatedly held that drug crimes are not necessarily crimes of "dishonesty or false statement" within the meaning of the Rule. *See, e.g., U.S. v. Logan,* 998 F. 2d 1025, 1032 (D.C. Cir. 1993) [distribution of drugs]; *U.S. v. Lewis*, 626 F.2d 940, 946 (D.C. Cir. 1988) [same]; *U.S. v. Millings*, 535 F.2d 121 (D.C. Cir. 1976) [drug possession]; *U.S. v. Hayes*, 553 F.2d 824 (2d Cir. 1977) [drug smuggling]. *See* Attachment B for a copy of *Hayes*.

Congress appeared to aim toward a similar target when it included "dishonesty or breach of trust" language in other Federal statutes. Construing the Federal Deposit Insurance Act (FDIC Act), the court in *Mallen v. FDIC*, 667 F.Supp. 652, 659 (N.D. Iowa 1987) wrote that the statute allowed removal of bank officers and directors convicted of crimes involving dishonesty or breach of trust because allowing such persons to remain in their positions could "pose a threat to the bank or impair public confidence in the bank." Both Fed. R. Evid. 609 and the FDIC Act are concerned with crimes that bear on a person's credibility. If a person has been convicted of a crime involving an element of deceit, there exists substantial reason to question that person's tendency to testify truthfully, and to honestly direct the affairs of a bank.

Presently there is no authority on point so it is logical to presume that Congress had the same intent when it included the phrase "dishonesty or breach of trust" in these new these Federal statutes.

However, at the State level, crimes involving dishonesty and breach of trust are determined according to the relevant statutes and case law of that particular jurisdiction. As a general statement, crimes involving dishonesty involve some element of deceit, misrepresentation, untruthfulness or falsification. Crimes involving breach of trust are based on the fiduciary relationship of the parties and the wrongful acts violating that relationship. Research has disclosed that it is fairly difficult to produce a generic definition of a crime of dishonesty or breach of trust that can be utilized by all the states. Each State has its own set of statutes and case law that defines what it is or is not. An example of a State law analysis of whether a crime is one involving dishonesty is *State v. Eugene*, 340 N.W. 2d 18 (N.D. Sup. Ct. 1983). The case discusses what a Federal analysis might be as well as what is required under State law. A copy of the case is found in Attachment C.

However, each jurisdiction already has in place a mechanism for determining whether a person is "trustworthy" in order to obtain a license; or in the case of a licensed agent who has just been convicted of a felony, a mechanism to determine whether that person is "untrustworthy" and thus subject to suspension or revocation of his or her license. Use of this existing mechanism may be helpful to designing and implementing a similar mechanism to consider what is a crime of dishonesty or breach of trust when faced with an application for written consent under Section 1033.

Of more problematic concern is the handling of applications for written consent by persons employed in the business of insurance, who, because of the nature of their duties, do not require licensure by the States. Careful attention must be paid to the actual duties of each applicant and the degree of control each person may have over the operations of the insurer. One must also be concerned with requiring a new application whenever the duties of a person who has been granted written consent change or are altered from those disclosed on the original application, especially when the person seeks to exercise a greater degree of authority on behalf of the insurer.

(B) "Willfully."

While attempting to provide guidance on a definition for "willfully," the working group discussed a two-tier standard – the prohibited person knows they have a felony conviction. They cannot plead ignorance of the law as a defense to "...willfully engaged in the business of insurance...." The test for willfulness, however, for the insurer that permits a prohibited person to continue to conduct the business of insurance may turn on the insurer's actual knowledge of a conviction and perhaps the affirmative action taken by that insurer to determine whether the individual is a prohibited person.

(1) "Willfully" Standard for Entities Found Employing Prohibited Persons.

Whether the "willfulness" requirement of Section 1033(e)(1)(B) requires actual knowledge and intent to violate the law or whether "willfulness" may be inferred from the facts and circumstances surrounding the prohibited person's employment is the subject of much legal discussion and case law.

(2) *Black's Law Dictionary*, Fifth Addition (1979) contains many definitions for "willful". It defines "willful" as:

(a) Proceeding from a conscious motion of the will; voluntary; or intending the result which actually comes to pass; designed; intentional; not accidental or involuntary. An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Willful is a word of many meanings, its construction often influenced by its context. *Screws v. United States,* 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495.

(b) The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. *United States v. Murdock,* 290 U.S. 389, 394, 395, 54 S.Ct. 223, 225, 78 L.Ed. 381.

(c) Whatever the grade of the offense the presence of the word "willful" in the definition will carry with it the implication that for guilt the act must have been done willingly rather than under compulsion and, if something is required to be done by statute, the implication that a punishable omission must be by one having the ability and means to perform. In re *Trombley*, 31 Cal.2d 801, 807, 193 P.2d 734, 739.

(d) A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

(e) Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.

"Willfully" has been interpreted to require mere knowledge of the relevant facts and not knowledge that the fact situation (*e.g.*, employment of a prohibited person is illegal. *United States v. Louis Lanni*, 446 F.2d 1102, 1110 (3d Cir. 1972); *United States v. Thermon Phillips, E.B. Rich, USX Corporation, a/k/a/ United States Steel Corporation*, 19 F.3d 1565, 1577 (11th Cir. 1994)). Other courts have construed "willfully" to require a finding of specific intent to violate the law. (*Cheek V. United States,* 498 U.S. 192, 200 (1991)). Thus, the oft-repeated maxim "ignorance of the law is no excuse" may be applicable to an insurer, or any person who works for it or with whom the insurer has the appropriate business relationship, that willfully permits a prohibited person under Section 1033(e) to engage in the business of insurance.

Further, failure to terminate an individual ineligible under 18 U.S.C. §1033 to be employed in the insurance industry could result in criminal prosecution under the theory that Section 1033(e) creates an unambiguous affirmative duty to act. (*See, United States v. James A. Irwin,* 654 F.2d 671, 678 (10th Cir. 1981); *United States v. Duane Wendall Larson,* 796 F.2d 244, 246 (8th Cir. 1986)).

The Supreme Court has observed that the term "willfully" has numerous meanings and "its construction [is] often...influenced by its context.[7] The interpretation of "willfully" turns on [each case's] own peculiar facts.[8] "Willfully" has been interpreted to require mere knowledge of the relevant facts and not knowledge that the fact situation (*e.g.*, employment of a "prohibited person") is illegal.[9]

The better construction of "willfully" is to require finding a specific intent to violate the law.[10] This interpretation is consistent with the purpose of Violent Crime Control and Law Enforcement Act of 1994 which was to make it a Federal crime to "defraud, loot or plunder an insurance company."[11] This legislation does not focus on fraud committed by claimants or beneficiaries of insurance policies. When enacting the Act, Congress erroneously believed that parallels could be

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7 Weldemar Ratzlaf and Loretta Ratzlaf v. United States, 114 S.Ct. 655, 659 (1994).

8 *Screws v. United States*, 325 U.S. 91, 101 (1945).

9 *United States v. Lewis Lanni*, 466 F.2d 1102, 1110 (3rd Cir. 1972); *United States v. Thermon Phillips, et al.* 19 F.3d 1565, 1577 (11th Cir. 1994).

10 *Cheek v. United States*, 498 U.S. 1992, 200 (1991).

11 H.R. Rep. No. 468, 103rd Cong., 2d Sess. @ 1 (1994).

drawn between the insurance industry's and the savings and loan industry's financial condition and the degree of criminality occurring within those industries.[12] Because the Act was meant to prosecute "company busters," and not the individual in an insurer's personnel department who hires a "prohibited person," the "prohibited person" provision should only be applied where a finding of a specific intent to violate the law has been made.

When defining "willful," a two-tier standard should be considered—one for prohibited persons and one for insurers. Clearly a prohibited person knows of their own felony record and each one has an obligation to determine if their crimes involve dishonesty or breach of trust. These people cannot plead ignorance of the law as a defense to "...willfully engaging in the business of insurance...." The test for "willfulness, however, for the insurer that willfully permits a prohibited person to participate in the business of insurance, should turn on the actual knowledge of the insurer and the affirmative action taken by that insurer to determine whether the individual is a prohibited person.

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**ACKNOWLEDGMENTS**

The *Guidelines* have been prepared by the members of the NAIC's Federal/State Coordinating Working Group and the Antifraud (E) Task Force.

A special thanks goes out to those individuals who drafted various sections included within the text of this document and those who served on review panels. Additionally, the Federal/State Coordinating Working Group received comments from numerous interested persons and organizations. The working group appreciates their contributions in helping to enhance the usefulness of these Guidelines.

[12] "Particularly in the wake of the crisis in the savings and loan industry and the number of bank failures, the Committee believes the Federal Government cannot simply sit by and watch another financial [industry] in this country be destroyed from within." H.R. Rep. No. 468, 103rd Cong., 2d Sess. @ 2 (1994).

# ATTACHMENTS

**Guidelines**
**for**
**State Insurance Regulators**
**to the**
**Violent Crime Control**
**and Law Enforcement Act of 1994:**

***18 United States Code***
***Sections 1033 and 1034***

**ATTACHMENT A:**
**18 UNITED STATES CODE, SECTIONS 1033 AND 1034**

*Sec. 1033. Crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce.*

(a)(1) Whoever is engaged in the business of insurance whose activities affect interstate commerce and knowingly, with the intent to deceive, makes any false material statement or report or willfully and materially overvalues any land, property or security—

> (A) in connection with any financial reports or documents presented to any insurance regulatory official or agency or an agent or examiner appointed by such official or agency to examine the affairs of such person, and
>
> (B) for the purpose of influencing the actions of such official or agency or such an appointed agent or examiner,

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under paragraph (1) is a fine as established under this title or imprisonment for not more than 10 years, or both, except that the term of imprisonment shall be not more than 15 years if the statement or report or overvaluing of land, property, or security jeopardized the safety and soundness of an insurer and was a significant cause of such insurer being placed in conservation, rehabilitation, or liquidation by an appropriate court.

(b)(1) Whoever—

> (A) acting as, or being an officer, director, agent, or employee of, any person engaged in the business of insurance whose activities affect interstate commerce, or
>
> (B) is engaged in the business of insurance whose activities affect interstate commerce or is involved (other than as an insured or beneficiary under a policy of insurance) in a transaction relating to the conduct of affairs of such a business, willfully embezzles, abstracts, purloins, or misappropriates any of the moneys, funds, premiums, credits, or other property of such person so engaged shall be punished as provided in paragraph (2).

(2) The punishment for an offense under paragraph (1) is a fine as provided under this title or imprisonment for not more than 10 years, or both, except that if such embezzlement, abstraction, purloining, or misappropriation described in paragraph (1) jeopardized the safety and soundness of an insurer and was a significant cause of such insurer being placed in conservation, rehabilitation, or liquidation by an appropriate court, such imprisonment shall be not more than 15 years. If the amount or value so embezzled, abstracted, purloined, or misappropriated does not exceed $5,000, whoever violates paragraph (1) shall be fined as provided in this title or imprisoned not more than one year, or both.

(c)(1) Whoever is engaged in the business of insurance and whose activities affect interstate commerce or is involved (other than as an insured or beneficiary under a policy of insurance) in a transaction relating to the conduct of affairs of such a business, knowingly makes any false entry of material fact in any book, report, or statement of such person engaged in the business of insurance with intent to deceive any person, including any officer, employee, or agent of such person engaged in the

business of insurance , any insurance regulatory official or agency, or any agent or examiner appointed by such official or agency to examine the affairs of such person, about the financial condition or solvency of such business shall be punished as provided in paragraph (2).

(2) The punishment for an offense under paragraph (1) is a fine as provided under this title or imprisonment for not more than 10 years, or both, except that if the false entry in any book, report, or statement of such person jeopardized the safety and soundness of an insurer and was a significant cause of such insurer being placed in conservation, rehabilitation, or liquidation by an appropriate court, such imprisonment shall be not more than 15 years.

(d) Whoever, by threats or force or by any threatening letter or communication, corruptly influences, obstructs, or impedes or endeavors corruptly to influence, obstruct, or impede the due and proper administration of the law under which any proceeding involving the business of insurance whose activities affect interstate commerce is pending before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of a person engaged in the business of insurance whose activities affect interstate commerce, shall be fined as provided in this title or imprisoned not more than 10 years, or both.

(e)(1)(A) Any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business , shall be fined as provided in this title or imprisoned not more than 5 years, or both.

(B) Any individual who is engaged in the business of insurance whose activities affect interstate commerce and who willfully permits the participation described in subparagraph (A) shall be fined as provided in this title or imprisoned not more than 5 years, or both.

(2) A person described in paragraph (1)(A) may engage in the business of insurance or participate in such business if such person has the written consent of any insurance regulatory official authorized to regulate the insurer , which consent specifically refers to this subsection.

(f) As used in this section—

(1) the term "business of insurance" means—

(A) the writing of insurance, or
(B) the reinsuring of risks,

by an insurer , including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons;

(2) the term "insurer" means any entity the business activity of which is the writing of insurance or the reinsuring of risks, and includes any person who acts as, or is, an officer, director, agent, or employee of that business ;

(3) the term "interstate commerce" means—

(A) commerce within the District of Columbia, or any territory or possession of the United States;
(B) all commerce between any point in the State, territory, possession, or the District of Columbia and any point outside thereof;
(C) all commerce between points within the same State through any place outside such State; or
(D) all other commerce over which the United States has jurisdiction; and

(4) the term "State" includes any State, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands.

*Sec. 1034. Civil penalties and injunctions for violations of section 1033.*

(a) The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under section 1033 and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater. If the offense has contributed to the decision of a court of appropriate jurisdiction to issue an order directing the conservation, rehabilitation, or liquidation of an insurer, such penalty shall be remitted to the appropriate regulatory official for the benefit of the policyholders, claimants, and creditors of such insurer. The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

(b) If the Attorney General has reason to believe that a person is engaged in conduct constituting an offense under section 1033, the Attorney General may petition an appropriate United States district court for an order prohibiting that person from engaging in such conduct. The court may issue an order prohibiting that person from engaging in such conduct if the court finds that the conduct constitutes such an offense. The filing of a petition under this section does not preclude any other remedy which is available by law to the United States or any other person.

**ATTACHMENT B:**
**U.S. V. HAYES, 553 F.2D 824 (2D CIR. 1977)**

UNITED STATES OF AMERICA, Appellee, v. LEROY HAYES, Appellant

Docket No. 76-1508, No. 713 - September Term, 1976

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

553 F.2d 824; 1977 U.S. App. LEXIS 13720; 1 Fed. R. Evid. Serv. (Callaghan) 950

April 21, 1977, Decided

PRIOR HISTORY:

Appeal from conviction on two counts of bank robbery, 18 U.S.C. § 2113(a), two counts of using a weapon in the commission thereof, 18 U.S.C. § 2113(d), and one count of assaulting a federal officer, 18 U.S.C. § 111, following a jury trial in the United States District Court for the Southern District of New York, Irving Ben Cooper, Judge.

DISPOSITION: Judgment affirmed.

COUNSEL: Frederick H. Cohn, New York, New York, for Appellant.

Sarah S. Gold, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Lawrence B. Pedowitz, Assistant United States Attorney, of counsel), for Appellee.

JUDGES: Feinberg, Oakes and Gurfein, Circuit Judges.

OPINIONBY: OAKES

OPINION: OAKES, Circuit Judge:

This appeal is from a judgment of conviction following a jury verdict in the United States District Court for the Southern District of New York, Irving Ben Cooper, Judge. Appellant was convicted on two counts each of robbing, 18 U.S.C. § 2113(a), and using a weapon in connection with the robbery, 18 U.S.C. § 2113(d), of a branch of The Manufacturers Hanover Trust Company on March 25, 1976, and a Chase Manhattan Bank branch on April 1, 1976. Similar act evidence was introduced as to another robbery by appellant of the Swiss Bank Corporation in the same general area of New York City on March 24, 1976. n1 A fifth count, for assault on federal agents at the time of appellant's arrest, 18 U.S.C. § 111, was based on events occurring on April 2, 1976, on the sidewalk in front of a branch of the Irving Trust Company. We affirm on all counts. n2

n1 The Swiss Bank Corporation robbery was not charged as a separate crime because that institution does not qualify as a "bank" as that term is defined in the federal bank robbery statute, 18 U.S.C. § 2113(f).

n2 Appellant was sentenced to consecutive terms of 15 years on two of the counts, and three years on the fifth count.

Appellant does not question the sufficiency of the evidence to sustain his conviction on any count. Nor could he, for the evidence, from numerous eyewitnesses and surveillance photographs, was more than ample to warrant conviction. He does question the legality of the search of the briefcase he was carrying when arrested, on the basis that there was no probable cause to arrest him; the court's refusal to suppress evidence of a recent narcotics conviction so that he might testify; the judge's charge on the Swiss Bank robbery evidence and "the unnecessary admission of testimony under it"; and the court's supplemental charge on the amount of force permissible in respect to the assault count.

I. We hold that there was probable cause to arrest appellant and hence that the search of his briefcase was lawful. Before arresting appellant, federal agents closely observed him and, standing at one point only five feet from him, compared his features with those in the concededly excellent quality bank surveillance photographs that they had with them. Such a photographic comparison may be sufficient evidence to establish guilt beyond a reasonable doubt, see *United States v. Fernandez*, 456 F.2d 638, 642 (2d Cir. 1972) (dictum), and thus a fortiori may constitute probable cause for an arrest. Here, moreover, the agents had descriptions from all three robberies: a tall, light-skinned, black man with sideburns and a moustache, wearing a ski cap and dark glasses, in the Manufacturers Hanover and Chase Manhattan robberies carrying a briefcase, in the Manufacturers Hanover and Swiss Bank robberies carrying a silver gun, and in the Swiss Bank robbery wearing white tape on his nose. Prior to Hayes's apprehension, as he was seen looking at, entering, and leaving the vestibule of the Irving Trust Co., in the same general area as the other banks, he was observed to be tall and light-skinned, to be wearing sideburns and a moustache, a business suit, dark glasses and tape on his nose, and carrying a briefcase. The motion to suppress was properly denied, n3 and hence the evidence that Hayes's briefcase contained a silver gun similar in appearance to that used in the Manufacturers Hanover and Swiss Bank robberies was properly admitted as the product of a search incident to a lawful arrest.

n3 *United States v. Shavers*, 524 F.2d 1094 (8th Cir. 1975), the main case relied on by appellant, is wholly inapposite. There the arresting officer had only the vaguest of descriptions and no photographs of the suspect.

II. We further hold that the court below did not err in refusing to suppress appellant's recent narcotics conviction. Appellant was convicted in early 1976 of one count of importation of cocaine. 21 U.S.C. § 952(a). Under Rule 609(a) of the Federal Rules of Evidence, he sought a ruling in the instant case that the Government would not be permitted to use this conviction in cross-examining him if he should testify in his own defense. He was unsuccessful and accordingly did not take the stand. Rule 609(a) established a two-pronged test of admissibility:

For the purposes of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Under the second prong of this rule, evidence of conviction of a certain type of crime - one involving "dishonesty or false statement" - must be admitted, with the trial court having no discretion, n4 regardless of the seriousness of the offense or its prejudice to the defendant. n5 Because this rule is quite inflexible, allowing no leeway for consideration of mitigating circumstances, it was inevitable that Congress would define narrowly the words "dishonesty or false statement," which, taken at their broadest, involve activities that are part of nearly all crimes. Hence Congress emphasized that the second prong was meant to refer to convictions "peculiarly probative of credibility," such as those for "perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, n6 the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 9, reprinted in [1974] U.S. Code Cong. & Ad. News 7098, 7103.

n4 It is an open question whether the trial judge retains residual discretion under Fed. R. Evid. 403 to exclude a conviction on grounds of confusion, waste of time, or extreme prejudice. *United States v. Smith*, 551 F.2d 348, slip op. at 19-21 n.20 (D.C. Cir. 1976).

n5 The Congressional Conference Committee, which produced the final compromise version of this much-amended Rule, explained:

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 9, reprinted in [1974] U.S. Code Cong. & Ad. News 7098, 7103. A more extensive history of Rule 609(a) may be found in *United States v. Smith, supra.* See also *United States v. Jackson*, 405 F. Supp. 938 (E.D.N.Y. 1975).

n6 The ancient term "crimen falsi" at common law referred to crimes that involved fraud or deceit, not simply on a private individual, but on the judicial process. The term has a broader meaning in civil judicial process. The term has a broader meaning in civil jurisdictions, and some modern sources have blurred the distinctions between the civil and common law views, but under both views fraud or deceit is always a prerequisite. *United States v. Smith, supra,* slip op. at 29-31 n.26.

The use of the second prong of Rule 609(a) is thus restricted to convictions that bear directly on the likelihood that the defendant will testify truthfully (and not merely on whether he has a propensity to commit crimes). It follows that crimes of force, such as armed robbery or assault, United States v. Smith, slip op. at 29-35 (D.C. Cir. Dec. 1976), or crimes of stealth, such as burglary, see id. at 33 n.28, or petit larceny, *Virgin Islands v. Testamark*, 528 F.2d 742, 743 (3d Cir. 1976); but see *United States v. Carden*, 529 F.2d 443, 446 (5th Cir.), cert. denied, 429 U.S. 848, 97 S. Ct. 134, 50 L. Ed. 2d 121 (1976), do not come within this clause. If the title of an offense leaves room for doubt, a prosecutor desiring to take advantage of automatic admission of a conviction under the second prong must demonstrate to the court "that a particular prior conviction rested on facts warranting the dishonesty or false statement description." *United States v. Smith, supra,* slip op. at 33 n.28.

Appellant's conviction was for the importation of cocaine, a crime in the uncertain middle category - neither clearly covered nor clearly excluded by the second prong test - and thus one as to which the Government must present specific facts relating to dishonesty or false statement. If this importation involved nothing more than stealth, the conviction could not be introduced under the second

prong. If, on the other hand, the importation involved false written or oral statements, for example on customs forms, the conviction would be automatically admissible. Because nothing more than the bare fact of conviction is before us, we must conclude that the prosecution has failed to carry its burden of justifying the admission of appellant's conviction under the second prong of Rule 609(a).

If a conviction may not be automatically admitted under the second prong, however, it may still be admitted in the court's discretion if it meets the criteria of the first. Under this test, a court must balance the probative value of the conviction against its prejudicial effect to the defendant. Unlike the rule that prevailed before Rule 609, see, e.g., *United States v. Palumbo*, 401 F.2d 270, 273 (2d Cir. 1968), cert. denied, 394 U.S. 947, 22 L. Ed. 2d 480, 89 S. Ct. 1281 (1969), the Government has the burden of showing that probative value outweighs prejudice. *United States v. Smith, supra,* slip op. at 23-25; *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976).

We hold that the district court did not abuse its discretion in admitting the conviction here. Several factors impel this conclusion. First, as Judge Cooper noted, the conviction was a very recent one (two months before the trial here, and after the bank robberies charged), and we have held that convictions have more probative value as they become more recent, see *United States v. De Angelis*, 490 F.2d 1004, 1009 (2d Cir.), cert. denied, 416 U.S. 956, 94 S. Ct. 1970, 40 L. Ed. 2d 306 (1974); *United States v. Puco*, 453 F.2d 539, 543 (2d Cir. 1971). n7 Second, the conviction was for a type of crime - smuggling - that ranks relatively high on the scale of veracity-related crimes, see *United States v. De Angelis*, supra, 490 F.2d at 1009 (interstate transportation of untaxed cigarettes), although not so high as to fall clearly within the second prong of Rule 609(a), as discussed supra. The conviction here has more probative value on credibility than, for example, a conviction for mere narcotics possession, n8 or for a violent crime, id.; *United States v. Smith, supra,* slip op. at 35. Third, appellant testified in his own defense at the trial that resulted in his prior conviction, and his conviction can be viewed as "a de facto finding that the accused did not tell the truth when sworn to do so." *United States v. Gordon*, 127 U.S. App. D.C. 343, 383 F.2d 936, 940 n.8 (1967), cert. denied, 390 U.S. 1029, 20 L. Ed. 2d 287, 88 S. Ct. 1421 (1968). Finally, the conviction was for a crime substantially different from the instant prosecution, so that there was not here the prejudice to appellant that inevitably results from the introduction of a conviction for the same crime as that for which he is on trial. See *United States v. De Angelis, supra*, 490 F.2d at 1009. While the court below was not as explicit as it could have been in identifying and weighing the relevant indicia of probative value and prejudice, we cannot say that it abused its discretion in concluding that the Government here carried its burden of showing that the probative value of appellant's conviction on the issue of his credibility outweighed its prejudice to him.

n7 Of course, if a conviction for any crime is more than ten years old, stricter standards apply to its admission. Fed. R. Evid. 609(b).

n8 In terms of credibility a conviction for sale of narcotics may fall somewhere between a conviction for narcotics smuggling and one for narcotics possession. See *United States v. Ortiz*, 553 F.2d 782 (2d Cir. 1977).

III. The judge's limiting charge on the plainly admissible Swiss Bank "similar act" evidence, Fed. R. Evid. 404(b), n9 was not erroneous. The trial court charged the jury to consider the evidence "in connection with the problem of identification." Four witnesses in the Swiss Bank had identified appellant, with varying degrees of certainty and precision, as the robber in the bank. Only the Swiss Bank surveillance photographs showed the silver-colored gun and the white tape on the robber's nose, key items going to identify (as well as to probable cause, as discussed in part I, supra). The judge's limiting instruction was perfectly correct. While ordinarily such an instruction would also point out that the evidence was not to be considered as showing bad character, the defense here had specifically asked the

court not to include that charge. n10 In the subsequent general charge, the judge charged the jury completely and accurately, without objection. n11

n9 The suggestion is made that the evidence was "unnecessary," but clearly it went to show a modus operandi, a "plan" under Fed. R. Evid. 404(b). See *United States v. Campanile*, 516 F.2d 288, 292 (2d Cir. 1975).

n10 When the Swiss Bank evidence was about to be offered, defense counsel, in a robing room conference, specifically requested that the usual limiting charge be altered:

I beg your Honor to be quite careful when you talk about "It is not evidence of bad character," because, again, that highlights the thing that is to be forbidden in a sense, and then the jury says, "Oh, but it could be used as evidence of bad character," and so I would implore your Honor to say that this is merely an aid to identification; that there is no concession that this is the defendant by anyone; that is a question which you will have to find - ...

The same way you find the two charges, and I would ask you to omit any caution about showing bad character, because there is no firm evidence that it is my client.

n11 The judge's charge, in relevant part, was as follows:

Evidence that an act was done at one time or on one occasion is not any evidence or proof whatever that a similar act was done at another time, or on another time, or on another occasion. That is to say, evidence that a defendant committed an act of a like nature may not be considered by the jury in determining whether the accused committed any crime actually charged in the indictment. Then how may it be considered, this evidence relating to the Swiss Bank?

The jury may consider that evidence for the specific limited purpose of demonstrating similarity of method and similarity of mode of operation, which might shed some light on the identity of this defendant as the man who committed the criminal acts at the Manufacturers Hanover Trust and at the Chase Manhattan Bank.

I repeat: The jury may consider that evidence with regard to the Swiss Bank for the specific limited purpose of demonstrating similarity of method and similarity of mode of operation, which might shed some light on the identity of this defendant as the man who committed the criminal acts at the Manufacturers Trust Company and at the Chase Bank. ...

Such evidence relating to the Swiss Bank offense may not, I emphasize, may not be considered by the jury for any other purpose whatsoever. I emphasize, the jury is not to infer that the defendant has a criminal propensity or bad character because of this evidence.

IV. The final point made by appellant relates to the supplemental charge made in response to a request from the jury for clarification "in layman's language" of the right to defend oneself, which appellant raised as a defense to the count charging assault on federal officers. Objection was made to the entire supplementary charge, which as we read it properly charged the underlying law, n12 and particularly to the use of hypothetical cases, one involving a resistant drug dealer and the other a deaf man, on the basis that the charge "reduced the defense argument to an absurdity." While this court has cautioned against the use of hypotheticals in a general charge if they may tend to divert the jury from the law, *United States v. Cassino*, 467 F.2d 610, 619 (2d Cir. 1972), cert. denied, 410 U.S. 913, 928, 942, 93 S. Ct. 957, 93 S. Ct. 959, 35 L. Ed. 2d 276 (1973), we have a different situation here, since the jury

expressed its confusion and specifically asked for further explanation "in layman's language." The judge introduced his two examples as, respectively, "an entirely distinct example" and "an extreme example." After explaining the hypotheticals, the judge distinguished the "layman's language" he had used from the "language that the law lays down," thus reemphasizing that the hypotheticals were for purposes of illustration only. We hold that there was no error in the supplemental charge.

n12 The court charged:

> If you have got the impression that they exerted force other than what their duty required, then throw out the charge. But if they used reasonable force, they had a right to. ...

So that if under all the circumstances you say under all the evidence dealing with what took place on that particular occasion, you believe that this defendant, you see, acted in ignorance of the officer's identity, and actually he believed - this defendant believed he was acting in lawful defense of his person or property, and he used no more than reasonable force in effectuating that purpose, he might be justified in exerting an element of resistance, and such an honest mistake of fact would be inconsistent with a criminal intent on his part.

Judgment affirmed.

**ATTACHMENT C:**
**STATE V. EUGENE, 340 N.W. 2D 18 (N.D. SUP. CT. 1983)**

State of North Dakota, Plaintiff and Appellee
v.
Donald J. Eugene, Defendant and Appellant
Criminal No. 926
Supreme Court of North Dakota
340 N.W.2d 18; 1983 N.D. LEXIS 396
October 31, 1983

PRIOR HISTORY:

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Larry M. Hatch, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: Gail Hagerty, States Attorney, Bismarck, North Dakota, for Plaintiff and Appellee; argued by Gail Hagerty.

Bickle, Coles & Snyder, Bismarck, North Dakota, for Defendant and Appellant; argued by James J. Coles.

JUDGES: VandeWalle, Sand, Pederson, Paulson, JJ. Opinion of the Court by Erickstad, Chief Justice. *

*Justice Wm. L. Paulson served as a Surrogate Judge for this case pursuant to Section 27-17-03, N.D.C.C.

OPINION BY: ERICKSTAD

OPINION: This is an appeal by the defendant, Donald J. Eugene, from a judgment and sentence of conviction entered upon a jury verdict finding him guilty of the offense of burglary. We affirm.

On July 11, 1982, at approximately 11:33 p.m., an alarm system installed in a Bismarck restaurant known as Caspar's East Forty [hereinafter referred to as Caspar's or restaurant] sounded at the Bismarck police station. Officer Jack Schulz, in response to a dispatch signal, arrived at the restaurant, which was closed for business, at approximately 11:37 p.m. He parked his patrol vehicle and began inspecting the doors and windows of the restaurant.

Officer Schulz testified that he observed, while in the process of his inspection, an individual, later identified as Donald J. Eugene, leaning into the open right rear window of a 1965 Chevrolet Belair automobile. The automobile was parked in the parking lot of a neighboring motel, located directly to the rear of the restaurant, known as the Econ-O-Inn. Officer Schulz testified further that he observed Eugene pull himself out of the window and turn. Officer Schulz then yelled and Eugene "took off at between a run and a jog" away from the automobile toward the Econ-O-Inn. Subsequently, in response to Officer Schulz's order to "stop and come over," Eugene stopped, walked toward Officer Schulz, and properly identified himself to the officer. Officer Schulz testified that he did not observe anyone else, other than

Eugene, in the area of the restaurant or the parking lot of the Econ-O-Inn upon and after his arrival at the scene.

Eugene's trial testimony was, in one important respect, contrary to that of Officer Schulz. Eugene did not dispute the fact that he was present in the parking lot of the Econ-O-Inn on the evening of July 11, 1982. He testified, however, that he did not lean into the window of the automobile as Officer Schulz allegedly observed. At trial Eugene recounted the events of the evening and his reason for being near the restaurant. He testified that, prior to his encounter with Officer Schulz, a friend dropped him off at the Ramada Inn, another motel located near the restaurant, so that he could locate another friend, Robert Arthlind, whom Eugene believed was staying there. Upon inquiry at the Ramada Inn, however, Eugene discovered that no registration existed for Arthlind. Eugene testified that he then telephoned his girlfriend, Karen Fredericks, from the Ramada Inn to see if she knew where Arthlind was staying. Fredericks testified that Eugene called her and told her that he was going to look for Arthlind at the Econ-O-Inn.

Eugene testified that, in his effort to locate Arthlind, he left the Ramada Inn, and was jogging through the parking lot of the Econ-O-Inn on his way to the Econ-O-Inn itself, when he heard the shouts of Officer Schulz. Eugene explained to the officer, after being informed of the burglary, that he was not even close to Caspar's, that he had come to see a friend, and then pointed out a pick-up truck in the parking lot which he thought belonged to Arthlind. Eugene alleged at trial that Officer Schulz arrested him because he was "in the area."

The remaining facts are not in dispute. Officer Schulz noticed, while waiting with Eugene for the arrival of other officers, that a gate providing entry to an outside enclosure annexed to the rear of Caspar's was partially open. The enclosed area, surrounded by a fence and partial roof, provides access to a walk-in freezer wherein meat products used by Caspar's are stored. Upon entering the enclosed area, Officer Schulz discovered boxes of meat outside the freezer. A steak knife, used to open a latch on the freezer door handle, and padlock, used to lock the freezer door, were found on a grease barrel just outside the freezer door. The freezer door was open.

Officer Schulz then inspected the automobile into which Eugene was allegedly leaning and discovered, on the right rear seat and floor, packages of prime rib and ham determined later to be missing from the restaurant's freezer. Also found inside the automobile, underneath the packages of meat, were a hammer and tire iron. The keys to the automobile were also found inside the automobile. Officer Schulz testified that the automobile in which the meat products were discovered is registered to another individual, Gary Potter. An unsuccessful attempt was made by the State to personally serve Potter with a subpoena to appear at Eugene's trial. Eugene testified that he knew Potter "casually."

Several additional officers of the Bismarck Police Department arrived at Caspar's and initiated an investigation of the scene of the burglary. The interior, exterior, and roof of the restaurant were searched. Photographs of the automobile, the meat products, and the enclosed area were taken by Officer Leonard Rohrer and admitted as evidence at Eugene's trial. Potter's automobile was impounded and the meat products found therein were left at the restaurant. Officer Schulz testified that he took custody of the padlock, knife, hammer, and the tire iron found at the scene and placed them in the evidence locker at the Bismarck Police Department. These items were not introduced as evidence by the State at trial. Upon cross-examination Officer Schulz testified that the items were lost. Although testimony was elicited from Officers Schulz and Rohrer concerning police procedures in handling items of potential evidence, no explanation was given for the loss.

Conflicting testimony was elicited at trial concerning the condition of the lost padlock. The owner of the restaurant, Caspar Borggreve, testified that he observed the padlock before it was taken into police custody. He indicated that the padlock was open, not broken, but that it was not necessary to break or cut that type of "long-neck" padlock to open it. Borggreve recounted an incident involving one of his cooks who opened, without a key, a "defective" padlock previously used on the freezer door. One merely had to "twist it and pull it up." He testified that he discarded that particular padlock and bought a "better, heavier" lock of the same type; however, he was not certain if this new padlock, in use on the evening the restaurant was burglarized, could be opened in the same manner without a key. A key for the padlock was accessible to restaurant employees in the restaurant's kitchen; however, Borggreve testified that the employees' key was in its proper place the following day.

Officer Rohrer testified that he observed that the lost padlock was either bent or pried open. Officer Schulz testified that the padlock was open when he found it and that the bottom "lock mechanism" part of the padlock was not damaged. He could not recall, however, whether or not the "long-neck" part of the padlock was open or pried apart. A photograph taken of the padlock from some distance, introduced by the State and admitted into evidence, does not reveal clearly the condition of the padlock.

Defense counsel argued to the jury at Eugene's trial his concern as to the State's loss of the items taken from the restaurant and automobile and their alleged importance in light of the testimony elicited concerning the condition of the padlock. The jury may have been concerned about this loss also as indicated by its inquiry of the court. n1

> n1 The trial court received a note from the jury during its deliberation of the verdict which reads as follows:
>
> "Are we permitted to find defendant guilty on the evidence available to us even if we feel that questionable police work may have seriously impaired the defendant's constitutional rights?
>
> "This is a legal question so we must be advised by the court."
>
> The court responded: "Jurors, you have the evidence and the instructions. You must reach your decision based on these."

Eugene has raised the following issues in this appeal:

I. Did the trial court err in denying Eugene's motion for judgment of acquittal and motion for a new trial based upon the loss of physical evidence by the State?

II. Did the trial court err in denying Eugene's motion *in limine* filed to preclude the State from using evidence of defendant's prior convictions?

III. Did the trial court err in granting Eugene only one day of credit for time served prior to his conviction in the instant case?

I. State's Loss of Evidence

Prior to trial, Eugene filed a motion for inspection and discovery pursuant to Rule 16, N.D.R.Crim.P., requesting a wide-ranging assortment of documents and articles, including relevant, tangible objects within the possession, custody, or control of the prosecution. The record does not

indicate whether or not the trial court ordered discovery pursuant to the motion. Nor is it evident whether or not the defense made any additional effort to examine the lost items prior to trial. The State was served with a copy of the motion.

> n2 Amendments to Rule 16, N.D.R.Crim.P., effective September 1, 1983, eliminate the necessity for discovery motions in almost all instances, including discovery of tangible objects, by providing that discovery proceed by written requests rather than motions. The motion made by Eugene was filed December 20, 1982, prior to this amendment of Rule 16.

At the close of the case, Eugene moved for judgment of acquittal on grounds that the evidence produced at trial was insufficient to sustain a conviction of burglary. A second motion for judgment of acquittal was made on grounds of police misconduct and negligence in the loss of "vital" evidence. Eugene contended that it had been shown at trial that the items would have been exculpatory and, therefore, the case should not go to the jury. The trial court denied the motions for the reason that the weight and materiality of the lost padlock would probably have been in question even if it had been received in evidence and that there was sufficient evidence to present a prima facie case to the jury. Following the jury verdict, Eugene moved for a new trial alleging as a basis therefor several grounds, including the State's loss of evidence. The trial court indicated that the case "rose and fell on the totality of the circumstances" and denied the motion for a new trial because it was not known whether or not the items lost by the State were exculpatory.

Eugene appeals to this Court contending that the trial court erred in denying the motion for acquittal and motion for new trial because the State's loss of the padlock, knife, hammer, and tire iron violated his constitutional rights of due process as interpreted by the United States Supreme Court in *Brady v. State of Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

In *Brady, supra,* 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218, the Supreme Court announced the rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Accord *State v. Anderson,* 336 N.W.2d 123, 129 (N.D. 1983); *State v. Skjonsby,* 319 N.W.2d 764, 785 (N.D. 1982); *State v. Larson,* 313 N.W.2d 750, 753 (N.D. 1981); *State v. Hilling,* 219 N.W.2d 164, 168-170 (N.D. 1974). The petitioner in *Brady, supra,* and a companion were found guilty of first degree murder. Prior to trial the petitioner had requested the prosecution to allow him to examine his companion's extra-judicial statements, and several of those statements were shown to him; but one, in which the companion had admitted the actual homicide, was withheld by the prosecution. The Court held that the suppression of this confession by the prosecution violated the petitioner's due process rights.

In *Moore v. Illinois,* 408 U.S. 786, 794-95, 92 S. Ct. 2562, 2568, 33 L. Ed. 2d 706, 713 (1972), the Supreme Court indicated that three matters are important in applying the Brady rule: "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." The duty to produce exculpatory materials under the Brady rule is not limited to materials in the hands of the prosecutor, but includes material known to the police. *Hilling, supra,* 219 N.W.2d at 169.

The Court clarified the Brady rule in *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), by enumerating three situations in which the Brady rule "arguably applies," each involving "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense."

The first situation involves prosecutorial use of perjured testimony where the prosecution knew or should have known, of the perjury. The standard of materiality or review to be applied in such a case is that the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs, supra*, 427 U.S. at 103, 96 S. Ct. at 2397, 49 L. Ed. 2d at 349-50. This is a strict standard of materiality espousing the view that the use of perjured testimony is fundamentally unfair and a corruption of the truth-seeking function of the trial process. *Agurs, supra.*

The second situation is characterized by a pre-trial request by the defense for specific evidence where the prosecution fails or refuses to disclose the evidence. The Brady decision itself presented this situation because it involved a specific request by the defendant for extrajudicial statements made by the defendant's companion. When such a specific request is made and the evidence requested is suppressed by the prosecution, that evidence is deemed material for purposes of the Brady rule if disclosure of the evidence "might have affected the outcome of the trial." *Agurs, supra,* 427 U.S. at 104, 96 S. Ct. at 2398, 49 L. Ed. 2d at 350.

The third situation discussed in *Agurs, supra,* arises when there has been either a general request for discovery of evidence, or no request is made at all. In this situation evidence not revealed by the prosecution will be held to be material "if the omitted evidence creates a reasonable doubt that did not otherwise exist [when] evaluated in the context of the entire record." *Agurs, supra,* 427 U.S. at 112, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355.

The differences between the two standards of materiality applicable in the latter two Brady situations, and the dependence for their application upon the specificity of a defendant's request, is designed to implement traditional values inherent in the concept of reasonable notice. *Agurs, supra*, 427 U.S. at 106-07, 96 S. Ct. at 2399, 49 L. Ed. 2d at 351. n3

> n3 Several jurisdictions, in cases involving the determination of whether suppressed evidence is of sufficient materiality to require its disclosure under Brady, have entered upon an initial consideration of whether the defendant made a "specific" or a "general" request for disclosure prior to trial. See *Scurr v. Niccum,* 620 F.2d 186, 190 (8th Cir. 1980); *Commonwealth v. Jackson,* 388 Mass. 98, 445 N.E.2d 1033, 1040 (1983).

The parties have essentially argued this case along the lines suggested by Brady and Agurs, i.e., was the evidence favorable to the defendant, and was the evidence material? Under *Brady, supra,* the State has a duty to disclose material evidence favorable to the accused. Eugene contends, as many jurisdictions have held, that the duty to disclose also operates as a duty to preserve exculpatory evidence. See, e.g., *United States v. Bryant,* 142 U.S. App. D.C. 132, 439 F.2d 642, 651 (D.C. Cir. 1971); *Lauderdale v. State,* 548 P.2d 376, 382 (Alaska 1976); *Garcia v. District Court,* 21st Judicial District, 197 Colo. 38, 589 P.2d 924, 929-30 (1979); *State v. Clements,* 52 Ore. App. 309, 628 P.2d 433, 435-36 (1981).

Eugene concedes that he can only speculate as to the exculpatory nature of the lost items; however, he believes the lost items may have provided direct or circumstantial evidence pertaining to the identity of the person who opened the padlock and/or the means utilized in opening the padlock. He contends, specifically, based upon the testimony elicited at trial concerning the condition of the lost padlock and Borggreve's testimony concerning the various possible means by which the padlock may have been opened, that disclosure and a subsequent examination of the padlock might have proved to be exculpatory in that (1) it "may have reasonably disclosed that it could have only been opened by a key;" (2) it "may have shown that the lock was opened by the twisting method known to the employees" of the restaurant, or (3) it "may have disclosed fingerprints of some other suspects." As to the remaining items

lost by the State, Eugene contends that a "testing [thereof] might have shown fingerprints on such items and might have disclosed whether these items were used in opening the lock." During oral argument, Eugene contended, specifically, that fingerprint analysis performed on the padlock may have disclosed the fingerprints of Gary Potter.

In *State v. Larson, supra,* 313 N.W.2d at 753-54, we extended the application of the Brady rule to cases wherein evidence requested by the defendant has been lost or discarded by the State: '"Were Brady and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal.'" *Larson, supra,* (quoting *United States v. Bryant, supra,* 439 F.2d at 648.). We nevertheless acknowledged in *Larson, supra,* that cases involving the loss or destruction of evidence present a quite different problem than that posed in those cases in which suppressed evidence is still in existence.

In *Larson, supra,* we determined that the State's good faith failure to preserve and provide the defendant the test ampoule used in a Breathalyzer examination performed subsequent to his arrest for DWI did not violate Brady. We deemed it appropriate in Larson, in light of the difficulty involved in applying the elements of Brady to evidence intentionally, but not maliciously or fraudulently, destroyed by the State, to adjust the materiality element of the Brady rule to require the defendant to "demonstrate that it is possible to analyze the test ampoule to obtain material evidence reflecting upon the accuracy of the test results."

We also adjusted, in *Larson, supra,* the favorability element of Brady to require the defendant to demonstrate a reasonable probability that the destroyed evidence, even if material, would have been favorable to him:

"The underlying principle of *Brady, supra,* is that a defendant must not be denied a fair trial by the State's withholding of evidence requested by him. However, the withholding of evidence by the State cannot deprive the defendant of a fair trial or violate his due process rights if that evidence is not favorable to the defendant. We believe that where the requested evidence has been destroyed, as in the instant case, the defendant, to establish a violation of his due process rights under *Brady, supra,* must demonstrate a reasonable probability that the destroyed evidence would have been favorable to him. In this regard we agree with the Oregon Court of Appeals in *State v. Michener*, 25 Ore. App. 523, 550 P.2d 449 (1976), wherein it stated:

'We deem it apparent that the Brady rule requires disclosure of material evidence where a defendant establishes some reasonable possibility, based on concrete evidence rather than fertile imagination, that it would be favorable to his cause.' 550 P.2d at 454."

*Larson, supra,* 313 N.W.2d at 756.

The test ampoule in *Larson, supra,* was potentially relevant and material because it is an essential part of the Breathalyzer test which gives rise under Section 39-20-07, N.D.C.C., to a presumption of intoxication depending upon the results of the test. We concluded, however, that the defendant failed to demonstrate the feasibility of testing the ampoule to obtain material evidence and, also, failed to introduce concrete evidence which would establish a reasonable probability that the destroyed evidence would have provided evidence favorable to him at trial.

In *Bryant, supra,* a tape recording of a conversation between the defendants and an undercover narcotics agent regarding the drug transaction at issue was unaccountably lost by the prosecution. Under

the circumstances in Bryant, the defendants' involvement in the transaction could only be established by proof of what was said during the taped conversation. Thus, the testimony of the narcotics agent was the key to the prosecution's case. Because the tape recording was "absolutely crucial to the question of appellants' guilt or innocence," and a possibility existed that the tape recording "might have been significantly 'favorable' to the accused," the court determined it was "crucial" evidence which the prosecution was obligated to preserve and disclose to the defense, either under Brady, Rule 16 of the Federal Rules of Criminal Procedure, or the Jencks Act.

The materiality of the evidence lost or destroyed in Larson and Bryant was apparent. We believe the State's duty under Brady to preserve evidence arises only after the State knows, or as reason to know, that the evidence is, or is claimed to be, material and exculpatory. *State v. Clements, supra,* 628 P.2d at 436.

The State contends that evidence of the means utilized in opening the padlock and evidence of who opened the padlock is of questionable relevance because the State was not required to show how the lock was opened. The crime of burglary as defined by our statute does not include, as a necessary element thereof, a "breaking" or "forcible entry". See *State v. Olson,* 290 N.W.2d 664, 673-74 (N.D. 1980). Section 12.1-22-02(1), N.D.C.C., reads as follows:

"A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein."

The element of entry for purposes of the offense of burglary may be proved, as it was here, by circumstantial evidence. *Olson, supra.* The evidence presented by the State at trial revealed that the restaurant's freezer was open; meat products from the freezer were missing; these products were discovered in Potter's automobile on the right rear seat; Officer Schulz observed Eugene, minutes after the burglar alarm sounded, leaning into the right rear window of Potter's automobile; the keys to the automobile were in the automobile; and Eugene testified that he was a casual acquaintance of Potter.

There is no indication, in light of the apparent immateriality of the lost items in terms of the State's burden of proof, that the State had any reason to know that the condition of the padlock and other items would be at issue or that Eugene believed them to be exculpatory. Since no fingerprint analysis had been made, the police could not have known whether the fingerprints of Potter or anyone else were on any of the items. An examination of the transcript of the preliminary hearing in this case reveals that Eugene received notice of the existence of the items taken by the police from Caspar's at the October 13, 1982, preliminary hearing. Eugene's trial commenced on February 10, 1983. Yet the record reveals that, except for the broad discovery motion filed on December 20, 1982, no effort was made to gain access to the items prior to trial. By the time the State was made aware of Eugene's contentions concerning the items at trial, the items had already been lost. There is no indication in the record that the police, prior to losing the items, had reason to know that the items might be material and exculpatory to Eugene.

In *Larson, supra,* our implicit consideration of the State's intentional, but good faith, destruction of the test ampoule is apparent. *Brady, supra,* indicates that the prosecution's good or bad faith in suppressing evidence is irrelevant to a determination of whether or not a defendant's due process rights have been violated. In *Bryant, supra,* the Court determined, after concluding that the prosecution had breached its duty of preservation under Brady, that the degree of good or bad faith by the prosecution can be considered in the determination of whether or not a sanction should be imposed. Relying on *United States v. Augenblick,* 393 U.S. 348, 89 S. Ct. 528, 21 L. Ed. 2d 537 (1969), the Court in Bryant

determined that criminal convictions otherwise based on sufficient evidence would be permitted to stand so long as the prosecution made earnest efforts to preserve discoverable materials.

In *Augenblick, supra,* an accused in a military court martial sought discovery of tape recordings made of the interrogation of a key prosecution witness -- the other participant in the crime for which the defendant was subsequently court-martialed and discharged from the service. It turned out that the tapes, which might have aided the defendant by enabling him to impeach the prosecution's witness, had been lost. The Supreme Court determined that there was no credible evidence to indicate that the tapes were suppressed, "presumably meaning bad faith suppression," *Bryant, supra,* but noted that "the Government bore the burden of producing [the tapes] or explaining why it could not do so." The Government's explanation was found adequate; the record contained extensive testimony concerning the recording facilities used and the Navy's routine followed in handling and using such tape recordings, and disclosed that "an earnest effort was made to locate them." Accordingly, the Court found no violation of due process even though the evidence was clearly discoverable under the Jencks Act.

In *Bryant, supra,* the Court concluded that the record before it was inadequate for a determination of whether the sanction sought was appropriate. The case was remanded with directions to "weigh the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial." Many jurisdictions follow this "pragmatic balancing" test in determining whether or not a due process violation has occurred in a case involving lost or destroyed evidence. See, e.g., *United States v. Picariello,* 568 F.2d 222, 227 (1st Cir. 1978); *State v. Amundson,* 69 Wisc.2d 554, 230 N.W.2d 775, 789 (1975). But see *State v. Vaster,* 99 Wash.2d 44, 659 P.2d 528, 533 (1983) [good or bad faith of prosecution not considered in determining whether State's failure to preserve evidence violated defendant's due process right; considered only in determining appropriate sanction].

We do not believe, in a situation such as that presented in the instant case, where the State may possibly be negligent in the loss of evidence, that a defendant's speculative version of the favorability and materiality of lost evidence must be uncritically accepted and prejudice assessed as if the nature of the evidence were as the defendant claims it might have been. It may be, though we do not now so decide, that intentional conduct, malicious or fraudulent, on the part of the State would warrant the inference that evidence lost or destroyed would have been favorable to a defendant.

Eugene has also failed to support with any evidence his contention that a reasonable probability exists that the items lost by the State would have provided material evidence favorable to him at trial. *Larson, supra.* The record contains only a limited amount of testimony concerning whether or not a meaningful fingerprint analysis could have been made of the sought for evidence. Officer Schulz testified that there was "not necessarily" a likelihood that any fingerprints could have been obtained from the padlock. Nor is there any indication that any employee of Caspar's, who had access to the padlock key or knew of the peculiar manner in which the prior padlock utilized by the restaurant could be opened, was involved in the burglary.

Under the circumstances, the State's loss of the padlock, knife, hammer, and tire iron in the instant case did not result in the denial of Eugene's due process right to a fair trial. Accordingly, the trial court did not err in denying the motion for acquittal and the motion for a new trial.

II. Admissibility of Eugene's Prior Convictions

Prior to trial, Eugene filed a motion in limine requesting of the trial court an order "precluding the use by the prosecution ... of any reference to or questions upon any previous convictions ... of the

defendant." The day of the trial, prior to selecting the jury, the trial court determined, "in light of the entire Rule 609(a) and (b)", N.D.R.Ev., that evidence of certain prior convictions -- two convictions for burglary, one conviction for forgery, and a conviction of two counts of possession of stolen property -- would be admissible for the purpose of attacking Eugene's credibility if he chose to testify. A prior negligent homicide conviction was deemed inadmissible. Eugene subsequently testified on his own behalf and on direct examination, prompted by the State's anticipated impeachment, admitted the prior convictions. The trial court's ruling on the admissibility of the prior convictions is assigned as error.

We deem it necessary to address, initially, the State's contention that any error in the trial court's denial of Eugene's motion in limine is harmless because the only testimony elicited at trial concerning prior convictions was that on direct examination of Eugene by defense counsel. The State refers us to our decision in *State v. Boushee*, 284 N.W.2d 423, 433-35 (N.D. 1979), wherein we stated that the trial judge in that case was not required to make a 609(a) ruling because the defendant introduced his prior conviction in evidence on direct examination as a matter of trial strategy. In *Boushee, supra,* the defendant contended that the trial court's refusal to make an advance ruling on the admissibility of his prior conviction had a significant effect on his trial strategy. He contended he was entitled to such a ruling at a time prior to his being sworn in as a witness. We held that it was not an abuse of discretion for the trial judge to deny the defendant's request for the ruling; however, we deemed it "better policy to make a ruling on the admissibility of a prior conviction, where the witness is the accused, at some time prior to his decision to take the stand because it does have an impact on the trial strategy involved." Advance rulings on admissibility are preferable because "counsel need to know what the ruling will be on this important matter so that they can make appropriate tactical decisions." 3 J. Weinstein & M. Berger, Weinstein's Evidence para. 609[05], at 609-82 (1982).

We believe the factual circumstances surrounding our statement in *Boushee, supra,* render it inapplicable to the instant case. In this case, an advance ruling was made prior to trial. A defendant does not waive his objection to an adverse ruling on a motion in limine by introducing his prior convictions on direct examination. Any rule to the contrary would be inconsistent with our decision to encourage (although not require) advance rulings on the admissibility of prior convictions where the trial court, in its discretion, finds them appropriate. n4 Thus, we proceed to the merits of Eugene's contentions as to the admissibility of his prior convictions.

> n4 We note that most circuit courts agree that a defendant does not waive objection to an adverse ruling on a motion in limine by not testifying at trial. See Weinstein's Evidence para. 609[05], pp. 609-82 to 609-83 (1982). The motion in limine may be subject to abuse in that the defendant may not intend to testify at all and yet seek a ruling in the hope of leading the trial judge into reversible error. See *United States v. Cook*, 608 F.2d 1175, 1184 (9th Cir. 1979), cert. denied 444 U.S. 1034, 100 S. Ct. 706, 62 L. Ed. 2d 670 (1980). There can be no abuse where the defendant does testify on direct.

Our conclusion that a defendant does not waive objection to an adverse ruling on a motion in limine by bringing out his prior convictions on direct examination as a matter of trial strategy is not inconsistent with our decision in *State v. Jensen*, 282 N.W.2d 55, 68 (N.D. 1979). In *Jensen, supra,* we determined that testimony submitted by the State concerning evidence of a prior altercation between the defendant and another which would have been inadmissible under Rule 404(b), N.D.R.Ev., was properly introduced for reasons which included the fact that other acts involved in the altercation were first brought out by the defendant in a light favorable to him. Our conclusion in *Jensen, supra,* was reached on the basis of the "exceptional" facts presented by that case and included our consideration of additional factors which we believed offset any prejudice which the defendant may have suffered as a result of admitting the testimony.

Rule 609(a), N.D.R.Ev., governs the admissibility of evidence of prior convictions for impeachment purposes. It reads as follows:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting his evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

Rule 609(a) represents a restriction upon the admissibility of prior convictions, as compared to prior North Dakota case law which allowed evidence of any criminal conviction for impeachment purposes. See *Dugas v. Felton*, 249 N.W.2d 215, 216 (N.D. 1976).

Rule 609(a) divides criminal convictions into two categories: convictions involving "dishonesty or false statement," and convictions for crimes "punishable by death or imprisonment in excess of one year [if] the court determines the probative value of admitting the evidence outweighs its prejudicial effect." Evidence of prior convictions for crimes of "dishonesty or false statement," having the greatest probative value on the issue of veracity, are automatically admissible for impeachment purposes under Rule 609(a)(2). *State v. Anderson*, 336 N.W.2d 123, 125 (N.D. 1983).

An examination of the transcript of the hearing on Eugene's motion in limine reveals the following colloquy between the parties and the trial court:

"THE COURT: ... Some convictions of the defendant are more than ten years old and therefore are inadmissible as provided by Rule 609(b) of the North Dakota Rules of Evidence.

"Evidence of other convictions should be excluded upon the basis of Rule 609(a) of the North Dakota Rules of Evidence because the prejudicial effect of such evidence to the defendant would outweigh the probative value of such evidence which would create a danger of unfair prejudice, confusion of the issues, or misleading of the jury. [This was a reading of Eugene's motion in limine.]

* * * *

"[DEFENSE COUNSEL]: ... The information provided in this case, indicates that some of the convictions of Mr. Eugene are more than ten years old, and we would want all of that -- any information on those convictions to be excluded. Also, we feel that there are other convictions that are listed that should also be excluded because it would create an unfair prejudice against Mr. Eugene....

"[STATE]: ... [Defense Counsel] I think has misread Rule 609(a). That Rule provides that those convictions may be admitted involving dishonesty or false statement, regardless of the punishment. I think that you can also exclude the prejudice factor.

"We have copies of judgments which indicate that Mr. Eugene was convicted of forgery in 1979, he was also convicted in 1979 of burglary, he was convicted of two counts of possession of stolen property in 1981, he was also convicted of negligent homicide in 1981. In addition, there was a burglary in 1975 which also we think should be admitted.

"THE COURT: All right. Did all of those result in convictions?

"[STATE]: All resulted in a conviction and a sentence, Your Honor. All were felonies and they were all within the past ten years.

"Certainly forgery and possession of stolen property involves dishonesty or false statements, and it is clearly admissible.

"THE COURT: In light of the entire Rule 609(a) and (b), I believe prior convictions within a ten year period of time and crimes of dishonesty or false statements, would be admissible and the Court would let you use them. As to the negligent homicide, I don't think that would qualify, so I will prohibit the state from using the negligent homicide conviction.

"The remainder of the convictions that you have mentioned, the Court will permit you to use them for attacking the credibility of the witness should he testify." [Emphasis added.]

Eugene's specific contentions are that the trial court did not make a determination pursuant to Rule 609(a)(1) whether or not the probative value of admitting the evidence outweighed its prejudicial effect. He contends further, in the alternative, that if we deem that a proper determination was made, the trial court abused its discretion in ruling that evidence of Eugene's prior burglary conviction was admissible because burglary is not a crime involving dishonesty or false statement, and because his two prior convictions for burglary were identical to the offense charged.

Eugene has misconstrued Rule 609(a). Under Rule 609(a)(1), evidence of prior convictions need not necessarily be for a crime involving "dishonesty or false statement," and under Rule 609(a)(2) the trial court need not consider the seriousness of punishment or the prejudicial effect of such evidence as it must if prior convictions are offered under Rule 609(a)(1). *Anderson, supra*, 336 N.W.2d at 125-26.

We deem it necessary to consider the admissibility of Eugene's prior convictions under Rule 609(a)(2) first, because a conviction which may not automatically be admitted as a crime involving "dishonesty or false statement" may still be admitted in the court's discretion if it meets the criteria of Rule 609(a)(1).

We recently discussed, but left unresolved, what constitutes a crime involving "dishonesty or false statement" for purposes of Rule 609(a)(2). See *Anderson, supra.* At first glance, the question seems easily resolved in light of the common meaning of the term "dishonesty." See *United States v. Papia*, 560 F.2d 827, 845 (7th Cir. 1977). We note that "dishonesty" includes, by definition, "any breach of honesty or trust, as lying, deceiving, cheating, stealing or defrauding." Webster's Third New International Dictionary, 650 (1971). It does not necessarily follow, however, that this broad definition of "dishonesty" should be employed in delineating the scope of Rule 609(a)(2). North Dakota Rule 609, although taken from the Uniform Rules of Evidence (1974), is quite similar to its counterpart in the Federal Rules of Evidence. This is so because the Uniform Rules of Evidence were conformed to the Federal Rules of Evidence for purposes of uniformity between State and Federal evidence law. Thus, the provisions of each are almost identical. 13 Uniform Rules of Evidence (U.L.A.) pp. 209-13.

In interpreting state procedural rules derived substantially from Federal analogues, we have consistently deemed it appropriate to consider, although we are not bound by, the construction and interpretations placed upon the Federal Rules by the Federal courts. See *State v. Forsland*, 326 N.W.2d 688, 692 (N.D. 1982). Federal decisions have interpreted the words "dishonesty or false statement," as contained in the Federal counterpart to Rule 609(a)(2), to apply only to those crimes that bear directly upon the accused's propensity to testify truthfully. See, e.g., *United States v. Ortega*, 561 F.2d 803, 805-06 (9th Cir. 1977); *United States v. Hayes,* 553 F.2d 824, 827 (2d Cir.), cert. denied, 434 U.S. 867, 98 S. Ct. 204, 54 L. Ed. 2d 143 (1977); *United States v. Smith*, 179 U.S. App. D.C. 162, 551 F.2d 348, 356-66 (D.C.Cir. 1976).

The Federal rationale for this limited applicability of Rule 609(a)(2) is grounded in the complex legislative history of Federal Rule 609, which illustrates that the rule constitutes a carefully considered legislative compromise growing out of a series of vigorous debates in committees and on the floor of both Houses of Congress. *United States v. Jackson*, 405 F. Supp. 938, 940-42 (E.D.N.Y. 1975) (Weinstein, J.). See generally 3 Weinstein's Evidence, pp. 609-02 to 609-54 (1982). Rule 609(a), as it was ultimately enacted, was worked out by a conference committee as a compromise between differing House and Senate formulations of the rule. In its report, the Conference Committee defined crimes of "dishonesty or false statement" as follows:

"By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimes falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. (1974), U.S. Code Cong. & Admin. News 1974, pp. 7098, 7103, reprinted following Fed. Rules Evid. 609, 28 U.S.C.S.

This language from the Conference Committee Report is the basis for the Federal Court's narrow interpretation of the words "dishonesty or false statement" in Rule 609(a)(2). Possession of stolen property and burglary were not crimes specified by the report. The remaining category, offenses in the nature of crimen falsi was defined in *United States v. Smith, supra*, 551 F.2d at 362-63:

"Even in its broadest sense, the term 'crimen falsi' has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth."

State jurisdictions have had occasion to interpret the words "dishonesty or false statement," contained in similar state adaptations of Rule 609(a) of the Federal Rules or Uniform Rules of Evidence, with differing results. See, e.g., *State v. Malloy*, 131 Ariz. 125, 639 P.2d 315, 316-19 (1981) [conviction for burglary not admissible under 609(a)(2); "does not necessarily involve element of deceit or falsification"]; *Floyd v. State*, 278 Ark. 86, 643 S.W.2d 555, 556-57 (1982) [burglary and theft are crimes involving "dishonesty"; no discussion]; *People v. Spates*, 77 Ill.2d 193, 32 Ill. Dec. 333, 395 N.E.2d 563, 568 (1979) [conviction for theft admissible under judicially adopted Rule 609(a)(2); limitation to crimen falsi offenses too restrictive]; *Hall v. Oakley*, 409 So.2d 93, 96-97 (Fla.Dist.Ct.App. 1982) [conviction for petit larceny not admissible; crime must involve "element of deceit, untruthfulness, or falsification"]; *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741, 751-52 (1981) [conviction for petit larceny not admissible as crime involving "dishonesty" in absence of showing that offense involved deceit or deception]; *State v. Butler*, 626 S.W.2d 6, 11 (Tenn. 1981) [shoplifting is crime involving "dishonesty"; no discussion]; *State v. Burton*, 33 Wash.App. 417, 655 P.2d 259, 260 (1983) [theft is crime involving "dishonesty"; no need to examine Federal legislative history when rule not ambiguous]; *State v. Zibell*, 32 Wash.App. 158, 646 P.2d 154, 155-58 (1982) [conviction for possession of stolen property not admissible under 609(a)(2); "not directly probative of whether defendant would or would not testify truthfully"].

n5 Some state courts have given the term "dishonesty" a broad definition which encompasses crimes such as burglary, theft, etc. These decisions do not, however, arise under a state version of the Federal Rule. See e.g., *Frankson v. State*, 645 P.2d 225, 227-29 (Alaska App. 1982); *State v. Thomas*, 220 Kan. 104, 551 P.2d 873, 876 (1976); *State v. Ybarra*, 102 Idaho 573, 634 P.2d 435, 442-43 (1981); *State v. Webb*, 309 N.W.2d 404, 413 (Iowa 1981); *State v. Trafton*, 425 A.2d 1320, 1323-24 (Me. 1981).

After examining the history and purpose of Rule 609, we agree with those courts that limit the phrase "dishonesty or false statement" to those crimes that bear directly upon the accused's propensity to

testify truthfully, that is, "crimes that involve some element of misrepresentation or other *indicium* of a propensity to lie and not to those crimes which, bad though they are, do not carry with them a tinge of falsification." *Ortega, supra*, 561 F.2d at 806. As we indicated in *Dugas v. Felton, supra*, 249 N.W.2d at 217, forgery is a crime involving dishonesty or false statement for purposes of Rule 609(a)(2). n6 See also *United States v. Field*, 625 F.2d 862, 871 (9th Cir. 1980); *State v. Kruse*, 302 N.W.2d 29, 31 (Minn. 1981).

n6 Forgery is defined by Section 12.1-24-01(1), N.D.C.C., as follows:

"A person is guilty of forgery or counterfeiting if, with intent to deceive or harm the government or another person, or with knowledge that he is facilitating such deception or harm by another person, he:

a. Knowingly and falsely makes, completes, or alters any writing; or

b. Knowingly utters or possesses a forged or counterfeited writing."

We conclude that evidence of Eugene's prior convictions for burglary is not an indicium of a propensity toward testimonial dishonesty, and was not automatically admissible under 609(a)(2). See *United States v. Glenn*, 667 F.2d 1269, 1272-74 (9th Cir. 1982) ["crimes of violence, theft crimes, and crimes of stealth do not involve 'dishonesty or false statement'"; convictions for burglary and grand theft not admissible under 609(a)(2)]; *United States v. Seamster*, 568 F.2d 188, 190-91 (10th Cir. 1978) [burglary ordinarily considered to be dishonest but not within provisions of Rule 609(a)(2)]; *United States v. Hayes, supra*, 553 F.2d at 827 ["crimes of force, such as armed robbery or assault, or crimes of stealth, such as burglary" not automatically admissible under Rule 609(a)(2)]. n7

n7 The State refers us to several Federal decisions that it asserts have held that burglary convictions are admissible for impeachment purposes, and reflect upon the honesty of a witness. See *United States v. Portillo*, 633 F.2d 1313, 1322 (9th Cir. 1980), cert. denied, 450 U.S. 1043, 101 S. Ct. 1764, 68 L. Ed. 2d 241 (1981); *United States v. Oliver*, 626 F.2d 254, 264 (2d Cir. 1980); *United States v. Brown*, 603 F.2d 1022, 1028 (1st Cir. 1979); *United States v. Oaxaca*, 569 F.2d 518, 526-27 (9th Cir.), cert. denied, 439 U.S. 926, 99 S. Ct. 310, 58 L. Ed. 2d 319 (1978); *United States v. Hawley*, 554 F.2d 50, 53, n. 7 (2nd Cir. 1977). These decisions are irrelevant to our discussion of Rule 609(a)(2) inasmuch as they involve the admissibility of prior burglary convictions under Rule 609(a)(1).

Likewise, Eugene's conviction for possession of stolen property is not directly probative of whether he would or would not testify truthfully. n8 We conclude that this conviction is not one which bears directly upon the accused's propensity to testify truthfully and as such is not a crime involving "dishonesty or false statement" for purposes of Rule 609(a)(2).

n8 Possession of stolen property is a consolidated theft offense defined in Section 12.1-23-02(3) of the North Dakota Century Code as follows:

"A person is guilty of theft if he:

* * * *

"3. Knowingly receives, retains, or disposes of property of another which has been stolen, with intent to deprive the owner thereof."

Many Federal courts have recognized that when a prior conviction by its definition is not included within Rule 609(a)(2), the prosecution may invoke the automatic admissibility provision by demonstrating that a particular prior conviction rested on facts warranting the "dishonesty or false statement" description. See *United States v. Mehrmanesh*, 689 F.2d 822, 833 n. 13 (9th Cir. 1982); *Glenn, supra*, 667 F.2d at 1273; *United States v. Whitman*, 665 F.2d 313, 320 (10th Cir. 1981); *United States v. Dorsey*, 192 U.S. App. D.C. 313, 591 F.2d 922, 935 (D.C.Cir. 1979); *Papia, supra,* 560 F.2d at 847; *Hayes, supra,* 553 F.2d at 827-28. The record here does not reveal, however, that Eugene utilized fraudulent or deceitful means in committing the prior crimes of burglary and possession of stolen property.

If a prior conviction is not automatically admissible under Rule 609(a)(2) as a crime involving "dishonesty or false statement," it may still be admissible in the trial court's discretion if it meets the criteria of Rule 609(a)(1). Rule 609(a)(1) is absolutely clear and explicit in requiring the trial court, before admitting evidence of a prior conviction, to make a determination that the probative value of the evidence outweighs its prejudicial effect to the defendant. *Anderson, supra*, 336 N.W.2d at 126. The prosecution bears the burden of persuading the court that the probative value of admitting evidence of a prior conviction outweighs its prejudicial effect. *United States v. Lipscomb*, 226 U.S. App. D.C. 312, 702 F.2d 1049, 1055, 1063 (D.C.Cir. 1983); Accord *Hayes, supra*, 553 F.2d at 828; *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), cert. denied, 429 U.S. 1025, 97 S. Ct. 646, 50 L. Ed. 2d 627 (1976). The defendant is then permitted to rebut the prosecution's presentation, pointing out the potentiality for unfair prejudice from admission of the evidence. *Mahone, supra.*

Eugene contends that the trial court erred in admitting evidence of his prior convictions because no determination was made, as required by Rule 609(a)(1), that the probative value of the evidence outweighed its prejudicial effect. We do not agree. The record reveals that the trial court relied on "the entire Rule 609(a) and (b)" as its basis for admitting evidence of Eugene's prior convictions.

As we indicated in *Anderson, supra,* the Seventh Circuit Court of Appeals in *Mahone, supra,* urged trial judges to make determinations exercising their discretion under Rule 609(a)(1) after a hearing on the record and to explicitly find whether or not the prejudicial effect of the evidence to the defendant will be outweighed by its probative value. Some of the factors which the Mahone Court indicated should be considered by the trial judge in making the determination include:

"(1) The impeachment value of the prior crime.

"(2) The point in time of the conviction and the witness' subsequent history.

"(3) The similarity between the past crime and the charged crime.

"(4) The importance of the defendant's testimony.

"(5) The centrality of the credibility issue." 537 F.2d at 929.

This list does not exhaust the range of possible factors that a trial judge may consider, but it does outline the more basic concerns relevant to the balancing under Rule 609(a)(1). See *United States v. Jackson*, 201 U.S. App. D.C. 212, 627 F.2d 1198, 1209 (D.C.Cir. 1980). We also express our preference, as did the Seventh Circuit in Mahone, that trial judges explicitly articulate their balancing process on the record to avoid the unnecessary raising of the issue of whether the judge has meaningfully invoked his

discretion under Rule 609(a)(1). This will simplify this Court's task of determining whether or not the trial judge followed the strictures of Rule 609(a)(1) in making the balancing determination.

While the trial court was not as explicit as it could have been in identifying and weighing the relevant indicia of probative value and prejudice, we cannot say, in view of the record, that the trial court failed to meaningfully exercise the discretion given it by Rule 609(a)(1). The trial court's ruling permitting the admission of evidence based "in light of the entire Rule 609(a)" indicates implicitly that, in line with the rule, it weighed the probative value of the evidence against the prejudicial effect to Eugene. *Mahone, supra.* The record before the trial court consisted of argument by defense counsel as to this very matter. Furthermore, Eugene's motion in limine containing Eugene's contentions concerning the prejudicial effect of the prior convictions was read aloud by the trial court in the presence of the parties at the outset of the hearing.

Eugene contends that the trial court abused its discretion in allowing admission of evidence of his prior convictions for burglary because those convictions were for a crime identical to the crime charged. We find no abuse of discretion. The prior burglary convictions were for a crime which, although not involving "dishonesty or false statement" for Rule 609(a)(2) purposes, still reflected adversely, in a general sense, on Eugene's honesty and integrity. See *United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979); *United States v. Oaxaca*, 569 F.2d 518, 527 (9th Cir.), cert. denied, 439 U.S. 926, 99 S. Ct. 310, 58 L. Ed. 2d 319 (1978). As such they were relevant to the question of Eugene's credibility which, in light of the contradictory testimony of Eugene and Officer Schulz, was a key issue in the case.

Prior convictions are not inadmissible per se on the issue of credibility merely because the offense involved is identical to that for which the defendant is on trial. See *United States v. Callison*, 577 F.2d 53, 55 (8th Cir.), cert. denied, 439 U.S. 873, 99 S. Ct. 209, 58 L. Ed. 2d 187 (1978); *Oaxaca, supra; United States v. Ortiz*, 553 F.2d 782, 784 n. 6 (2d. Cir.), cert. denied, 434 U.S. 897, 98 S. Ct. 277, 54 L. Ed. 2d 183 (1977). As was stated by the Second Circuit Court of Appeals in *Ortiz, supra:* "The fact that the prior conviction is for the same offense requires particularly careful consideration of all the factors by the trial judge before permitting its use, but does not mandate its exclusion."

We find no error on the part of the trial court in admitting the evidence of Eugene's prior convictions.

III. Credit for Time Served

Eugene alleges that the trial court erred in granting him only one day of credit for time served prior to his sentencing in this case. We find no merit in this contention.

On July 11, 1982, Eugene was arrested in connection with the police investigation of the burglary of Caspar's and was held in the Burleigh County Jail until the following day when he was released on bond. On August 23, 1982, Eugene's suspended sentence of one year for convictions of possession of stolen property and negligent homicide in Morton County was revoked. His bond on the burglary charge was revoked on August 24, 1982. On that same day, he was taken to the State Hospital for an evaluation ordered pursuant to the revocation, and remained there until September 23, 1982, after which he was transferred to the State Penitentiary.

On February 23, 1983, Eugene was sentenced to four years imprisonment on the burglary conviction, to commence that day, and received credit for the one day he was incarcerated in the Burleigh County Jail. Eugene then filed a motion to correct, as a clerical mistake, the credit received for time

served, which he contended ought to have included the period of time from September 23, 1982, to March 9, 1983, the date of the criminal judgment. The court denied the motion.

Eugene contends it was the intent of the court that the sentence run concurrent "in all ways" with the sentence he was serving as a result of his probation revocation. The record is clear, however, in revealing that the sentence imposed was "to commence [on February 23, 1983]," and only one day of credit for time served was contemplated by the sentencing judge.

Section 12.1-32-02(2), N.D.C.C., clearly states in pertinent part:

"Credit against any sentence to a term of imprisonment shall be given by the court to a defendant for all time spent in custody as a result of the criminal charge for which the sentence was imposed, or as a result of the conduct on which such charge was based." [Emphasis added.]

Credit for time served, therefore, is appropriate when a defendant's pretrial incarceration is due to his inability to make bail, but is inappropriate for time served in connection with wholly unrelated charges based on conduct other than for which the defendant is ultimately sentenced.

The trial court properly applied the statute in denying Eugene's motion. During the period between August 24, 1982, and February 23, 1983, Eugene was incarcerated pursuant to an order revoking probation and order of commitment imposed in connection with his prior convictions for crimes completely unrelated to the burglary charge. During the period from July 11, 1982, to July 12, 1982, Eugene was held as a direct result of the burglary charge. He has been given appropriate credit for time served.

Eugene relies on several decisions of the Court of Appeals of Michigan, in requesting this Court to undertake a "liberal" reading of the credit statute. See, e.g., *People v. Potts*, 46 Mich.App. 538, 208 N.W.2d 583 (1973). We do not believe, however, that we may disregard the clear language of the statute. We find no error in the trial judge allowing only one day of credit for time served in the instant case.

In accordance with the foregoing opinion, this Court affirms the judgment and sentence of the trial court.

VandeWalle, Sand, Pederson, Paulson, JJ., sitting as Surrogate J., concur.

**ATTACHMENT D:**
**DOCUMENTS FROM LEGISLATIVE HISTORY**

**H.R. Rep. No. 468, 103d Cong., 2d Sess. (1994)**
**INSURANCE FRAUD PREVENTION ACT OF 1994**

**March 25, 1994.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed**

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**Mr. BROOKS, from the Committee on the Judiciary, submitted the following**

**REPORT**
**[To accompany H.R. 665]**
**[Including cost estimate of the Congressional Budget Office]**

The Committee on the Judiciary, to whom was referred the bill (H.R. 665) to amend title 18, United States Code, to provide that fraud against insurance companies will be subject to strong Federal criminal and civil penalties, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment (stated in terms of the page and line number of the introduced bill) is as follows:

Page 1, line 5, strike "1993" and insert "1994".

## SUMMARY AND PURPOSE

H.R. 665 establishes Federal criminal and civil penalties for fraud against insurance companies doing business in interstate commerce. This Act makes it a federal crime to defraud, loot, or plunder an insurance company.

## COMMITTEE VOTE

On March 17, 1994, a reporting quorum being present, the Committee on the Judiciary ordered H.R. 665 reported without amendment to the full House by voice vote.

## SUBCOMMITTEE ACTION

On March 11, 1994, the Subcommittee on Crime and Criminal Justice favorably reported H.R. 665 by voice vote without amendment.

## BACKGROUND

For five years, the Energy and Commerce Committee's Subcommittee on oversight and Investigations conducted investigations and held oversight hearings on the insurance industry. These hearings demonstrated that enforcement of insurance laws and regulations is one of the weakest links in the insurance regulatory system. In February, 1990, the Subcommittee focused attention on the need for Federal criminal legislation in its report "Failed Promises." In this report, the Subcommittee examined four major insurance company failures and concluded that existing state remedies were ineffective against the fraudulent behaviors that drove those companies into insolvency.

The National Association of Insurance Commissioners, the National Conference of State Legislators, the National Association of Casualty and Surety Agents, the National Association of Professional Agents, and the National Association of Mutual Insurance Companies have all called on Congress for a Federal criminal statute to help insurance regulators deal with interstate insurance fraud schemes.

Under present laws, all too often the perpetrators of fraud and deceptive practices in the insurance field not only are able to carry out their schemes with impunity, but – equally troubling – they move on to another insurance company to inflict still more harm to the good name of insurance. Insurance fraud frequently involves complex "paper trails", and applicable statutes of limitations often expire before a criminal investigation for insurance fraud can be completed. Because of their five-year statutes of limitations, Federal mail and wire fraud statutes have largely proven ineffective in dealing with problems. The Committee believes it is clear that current criminal statutes and penalties are inadequate to deal with the fraudulent activity in this industry, and that a specific Federal criminal statute is necessary. State and Federal law enforcement officials have determined that insider insurance fraud is fast becoming the number one white collar crime in America today. Particularly in the wake of the crisis in the savings and loan industry and the number of bank failures, the Committee believes the Federal Government cannot simply sit by and watch another financial industry in this country be destroyed from within.

The Committee believes that the rigors of the current financial service marketplace on honest companies are tough enough; they must not be damaged further by such fraudulent acts.

In coordination with the Committee on Energy and Commerce, the National Association of Insurance Commissioners, State officials, and others associated with the insurance industry, a legislative proposal was developed and Congressmen Dingell and Brooks introduced H.R. 3a71 in 1991. In 1992, H.R. 3171 was incorporated into the omnibus crime bill that passed the House as the Conference Report on H.R. 3371. However, that Conference Report was not adopted by the U.S. Senate. In 1993, Congressmen Dingell and Brooks re-introduced the insurance fraud proposal as H.R. 665, and it was referred to this Committee.

## SECTION-BY-SECTION ANALYSIS

### SECTION 1

**Short title: Insurance Fraud Prevention Act of 1994.**

### SECTION 2

This section amends Chapter 47 of title 18 by adding two new sections, Section 1033 and Section 1034.

Section 1033 allows Federal prosecution if a person, with the intent to deceive, knowingly files a false statement or report with an insurance regulator, or willfully and materially overvalues any land, property or security in documents filed with an insurance regulator; embezzles or misappropriates from an insurance company funds or property worth $5,000 or more; makes false entries or statements regarding the financial condition of an insurance company so as to deceive any individual or regulator regarding the financial condition or solvency of that company; or, obstructs the investigations of insurance regulators. In addition, Federal prosecution lies against whoever after conviction under this section willfully works in the insurance field without a waiver from government authorities, as well as whoever in the business of insurance willfully permits such participation.

If the amount or value of a violation under this section does not exceed $5,000, the punishment is a fine or imprisonment of not more than one year, or both. If the violation jeopardizes the safety and soundness of an insurer and was a significant cause of such insurer being placed in conservation, rehabilitation, or liquidation, the term of imprisonment shall be not more than 15 years. Otherwise, the punishment for an offense under this section is a fine or imprisonment for not more than 10 years, or both. Anyone convicted of an offense under this section (or who has been convicted of any criminal felony involving dishonesty or a breach of trust) who willfully engages in the business of insurance without a waiver by an appropriate insurance regulator is subject to a fine or imprisonment of not more than 5 years, or both. Anyone who willfully permits such a person's participation in the industry is

subject to the same penalties as is that person. Section 1033 also defines the terms "business of insurance", "interstate commerce", and "State".

Section 1034 permits the Attorney General to bring civil actions and to seek injunctions against violators. The civil penalty shall be not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater. If the offense contributed to an insurer's insolvency, the penalties will be remitted for the benefit of the policyholders, claimants, and creditors of that insurer.

## SECTION 3

Section 3 also makes miscellaneous conforming amendments to title 18 with regard to insurance, prohibiting tampering with insurance regulatory proceedings and prohibiting obstruction of criminal investigations. It also establishes a 10-year statute of limitations for offenses committed under §1033.

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditure.

## INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1024 will have no significant inflationary impact on prices and costs in the national economy.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 1025, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE
*Washington, DC, March 18, 1994*

Hon. JACK BROOKS,

*Chairman, Committee on the Judiciary, House of Representatives, Washington, DC*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 665, the Insurance Fraud Prevention Act of 1994, as ordered reported by the House Committee on the Judiciary on March 16, 1994. CBO estimates that enactment of the bill could lead to increases in both direct spending and receipts, but the amounts involved would be less than $500,000 a year. Because the bill could effect both direct spending and receipts, pay-as-you-go procedures would apply. The bill would not affect the budgets of state or local governments.

, H.R. 665 would create several new federal crimes and associated penalties – prison sentences, civil fines, and criminal fines – related to insurance fraud that affects interstate commerce. The imposition of new civil and criminal fines could cause governmental receipts to increase through greater penalty collections, but we estimate that any such increases would be less than $500,000 annually. Criminal fines would be deposited in the Crime Victims Fund and would be spent in the following year. Thus, direct spending from the fund would match the increase in revenues with a one-year lag.

If you wish further details on this estimate, we will be pleased to provide them. The staff contacts are Mark Grabowicz, who can be reached at 226-2860, and Melissa Sampson, who can be reached at 226-2720.

Sincerely,

ROBERT D. REISCHAUER,

*Director.*

* * * * *

**140 Cong. Rec. E748 (daily ed. Apr. 21, 1994) (Statement of Rep. Pomeroy)**

Mr. POMEROY. Mr. Speaker, the National Association of Insurance Commissioners (NAIC), in April 1991, initiated the call for a Federal fraud statute aimed at white-collar insurance fraud. Founded in 1871, the nonprofit NAIC is our Nation's oldest organization of State officials. The NAIC is comprised of the chief insurance regulatory officials from the 50 States, the District of Columbia, American Samoa, Guam, Puerto Rico, and the Virgin islands. At that time, I was proud to be the Commissioner of Insurance for North Dakota and the immediate past president of the NAIC.

The NAIC's proposal included the basic elements – false reports or overvaluing of land, property, or security; embezzlement or theft; false entries; and obstruction of regulatory proceedings – incorporated in the conference report to the omnibus crime bill from the 102d Congress. On January 27, 1993, Representatives DINGELL and BROOKS introduced H.R. 665, the Insurance Fraud prevention Act of 1993, a freestanding insurance-fraud provision, which the Committee on the Judiciary has included in H.R. 4092, the omnibus crime bill. I congratulate Representatives, DINGELL and BROOKS for sponsoring H.R. 665, and I note that they introduced a similar bill in the 102d Congress. Further, I applaud the efforts of Representative SCHUMER for moving this legislation through the Subcommittee on Crime and Criminal Justice.

While insurance should remain state regulated, there is certainly a role for the Federal Government to play in concert with the State insurance departments and the NAIC. The NAIC proposed this statute because the Federal Government has unequaled clout, reach, and investigatory and law enforcement resources. The State insurance departments are ready and willing to investigate and prosecute insurance fraud, often in cooperation with Federal law enforcement agencies. In certain circumstances, the States have not been able to prosecute wrongdoers – extradition, for example, can pose a formidable barrier – and this has motivated the State insurance departments and the NAIC to seek Federal assistance. Federal criminal statutes, with the law enforcement and judicial authority and resources of the United States behind them, offer both deterrence and punishment. While reasonable people may disagree over the need for Federal regulation of the business of insurance, I think we can all

agree that a Federal criminal statute should be viewed as enhancing, not superseding, State law enforcement. Indeed, in a recent op-ed piece in the *New York Times*, March 11, 1994, Maryanne Trump Barry, a federal district judge in New Jersey and the chairwoman of the Criminal Law Committee of the Judicial Conference of the United States, while criticizing too wide of an extension of Federal criminal jurisdiction, acknowledged that "U.S. courts have traditionally handled complex cases with nationwide impact: serious interstate offenses, organized crime and major drug enterprises, white-collar crime, State and local corruption and international offenses." Surely, complex, white-collar insurance fraud, often perpetrated by sophisticated, international criminals, should be a Federal crime.

Mr. Speaker, I am pleased that the NAIC's original proposal called for stiff fines and long prison terms. As it would appear that the Federal Sentencing Guidelines determine the length of prison terms, I am not prepared to argue that the higher NAIC prison terms should have been adopted, though an argument can be made that including a substantial prison term in a statute provides a concrete indication of the importance Congress places on a particular crime. For example, the bank fraud statute, on which the NAIC modeled its insurance fraud proposal, provides for 30-year prison terms. The statute passed today provides for 10-year prison terms, which can be increased to 15 years when the safety or soundness of a financial institution is jeopardized. I continue to believe, along with the NAIC, that the fines should be increased to $1 million, rather than the fines in the proposed statute of $250,000 for individuals and $500,000 for organizations.

Finally, I will note that in the 102d Congress one word was added in the conference committee, and included in H.R. 665, that remains troubling to those of us interested in the best possible regulation of the business of insurance. The adjective "financial" was added before "reports and documents" submitted to regulators or examiners, as in proposed §1033(a)(a)(A). As a former insurance regulator, I believe this is a troubling addition. The insurance-fraud proposal does not include a definition of "financial" or of "financial reports or documents." A number of reports and documents are not explicitly "financial" in nature, but are nevertheless extremely important to effective insurance regulation. In "Failed Promises: Insurance Company Insolvencies," a report by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, Committee Print 101-P, February 1990, the Subcommittee on Oversight and Investigations suggested there were abuses connected to such nonfinancial information as applications for licenses; filings on holding company transactions; filings on parent-subsidiary transactions; and filings on mergers, consolidations, and acquisitions. With the addition of one word – "financial" – it is quite possible that fraudulent activities in these areas would not be covered as Federal offenses. Based upon my 7 years of experience as the commissioner of insurance for North Dakota, I happen to believe that these are rather significant activities. I believe that this legislation, without an adequate definition of "financial," should not include that adjective.

Mr. Speaker, the Senate has already passed an omnibus crime bill that includes an insurance-fraud statute. With our action today, I hope the 103d Congress will soon pass this provision. By making white-collar insurance fraud a Federal offense, we ill give State insurance departments a strong weapon in their fight against insurance fraud.

* * * * *

**139 Cong. Rec. E209-10 (daily ed. Jan. 27, 1993) (statement of Rep. Dingell).**

Mr. DINGELL. Mr. Speaker, today, I along with my colleague from Texas, the distinguished and respected chairman of the Judiciary Committee, JACK BROOKS, am introducing legislation that would make it a Federal crime to defraud, loot, or plunder an insurance company. This is legislation we first introduced in the 102d Congress. This bill will allow Federal prosecution if a person: First, knowingly files a false statement or property valuation with an insurance regulator; second, embezzles or misappropriates funds or property from an insurance company; third, makes false entries or statements

regarding the financial condition of an insurance company with the intent to deceive any individual or regulator regarding the financial condition or solvency of that company; and fourth, obstructs the investigations of insurance regulators.

The Insurance Fraud Prevention Act of 1993 is a result of more than 5 years of hearings conducted by the Energy and Commerce Subcommittee on Oversight and Investigations. These hearings demonstrated that enforcement of insurance laws and regulations is one of the weakest links in the present insurance regulatory system. States apparently are not collecting adequate information, investigating wrongdoing, or taking legal action against the perpetrators of insurance insolvency. Statutory penalties and remedies also seem out-of-step with the realities of today's insurance market and the interstate and international nature of the business of insurance in today's marketplace. With little fear of meaningful administrative sanctions or criminal prosecution, there is no Federal deterrent for wrongdoing and no real deterrent for most complex insurance fraud schemes.

Prosecution, conviction and incarceration have proven to be very effective in deterring white-collar crime, yet most people involved with recent cases of obvious wrongdoing at insolvent insurance companies simply walk away with no real investigation of their activities. Many of them continue to be active in the insurance business. It is clear that the current criminal statutes and penalties are inadequate to deal with this fraudulent activity, and that there are insufficient resources being devoted to criminal enforcement of insurance fraud at the State level.

At present, Federal criminal enforcement is restricted because plundering an insurance company is not a Federal crime. Mail and wire fraud statutes are the primary way to attack insurance fraud, but these Federal antifraud laws have a 5-year statute of limitations, which often expires before the criminal investigation can be completed. There should be a specific Federal criminal statute to deal with fraudulent behavior at insurance companies.

Insurance is truly an interstate business, and abuse of insurance companies has also become interstate in scope. Moving money and assets from one State or country to another offshore, basing companies in foreign countries, and evading enforcement jurisdiction by leaving one State and starting up in another are standard elements in cases observed by this committee's Oversight and Investigations Subcommittee. This new Federal insurance fraud prevention bill will be a strong enforcement tool to bring a stop to criminal fraud in the business of insurance.

I want to express my appreciation to Chairman BROOKS for his work in moving this bill last Congress and look forward to working with him and this House on this important matter this year.

* * * * *

**137 Cong. Rec. H8045-46 (daily ed. Oct. 17, 1991) (statement of Rep. Dingell).**

Mr. DINGELL. Mr. Chairman, H.R. 3371, the Omnibus Crime Control Act of 1991, contains many important provisions to prevent and punish crime in this country. One important part of this bill is a proposal that I, along with my colleague, the chairman of the Judiciary Committee, introduced earlier this year to make it a Federal crime to defraud an insurance company. I believe that this new statute will help prevent many of the serious crimes perpetrated by some unscrupulous individuals in the interstate insurance arena.

This provision, which is now section 1301 of the crime bill, is the result of 3 years of hearings conducted by the Energy and Commerce Subcommittee on Oversight and Investigations. These hearings demonstrated that the enforcement of insurance laws and regulations is one of the weakest links in the present insurance regulatory system. States apparently are not collecting adequate information, investigating wrongdoing, or taking legal action against the perpetrators of insurance fraud even when an insolvency results from that fraud. Statutory penalties and remedies also seem out-of-step with the realities of today's insurance market and the interstate and international nature of the business of

insurance in today's marketplace. With little fear of meaningful administrative sanctions or criminal prosecution, there is no Federal deterrent for most complex insurance fraud schemes.

The purpose of this insurance fraud provision is to establish strong Federal criminal and civil penalties for fraud against insurance companies doing business in interstate commerce. For 3½ years, the Energy and Commerce Subcommittee on Oversight and Investigations conducted investigations and hearings on the insurance industry. In February 1990, the subcommittee focused public attention on the need for Federal criminal legislation with its report, "Failed Promises." In this report, the subcommittee examined four major insurance company failures and concluded that existing State remedies were ineffective against the fraudulent behaviors that drove these companies into insolvency:

[M]ost people involved with obvious wrongdoing at insolvent insurance companies simply walk away with no real investigation of their activities. Many of them continue to be active in the insurance business.

The subcommittee also found that:

Federal enforcement efforts are greatly restricted because looting an insurance company is not itself a Federal crime, and the 5-year statute of limitations on mail and wire fraud have often run before a case can be successfully developed.

Based on this record, Chairman BROOKS and I introduced the insurance fraud bill, H.R. 3171, the provisions of which are now contained in section 1301 of this crime bill.

The Dingell-Brooks proposal amends Title 18 of the United States Code by adding two new sections to the title and amends two existing statutes to provide adequate enforcement against insurance fraud.

New section 1033 establishes specific Federal crimes and strong penalties for willful and material insurance fraud. This section contains five subsections. Subsection (a) would make it a Federal crime to file fraudulent statements with insurance regulators for the purpose of influencing the regulators' decisions. Subsection (b) would make it a Federal crime to embezzle or misappropriate insurance company money, funds, premiums, or credits. Subsection (c) would make it a Federal crime to falsify company records or to deceive its policyholders and creditors about the financial status of an insurance company. Subsection (d) would make it a Federal crime to obstruct the proceedings of insurance regulatory authorities. Subsection (e) would prevent those who have committed felony involving dishonesty from engaging in the business of insurance for 5 years.

New section 1034 would authorize the Attorney General to bring a civil action for a money penalty against any person who has violated the provisions of new section 1033. This provision also authorizes injunctive relief to prevent continuing conduct that violates section 1033. Under section 1034, any civil fines for violations of 1033 would, if the violation contributed to the insolvency of the insurance company, affected by the violations, be remitted to the appropriate State regulator for the benefit of the policyholders, claimants, and creditors of that insurance company. This provision will ensure that those harmed by these fraudulent acts will be made whole to the maximum extent possible.

Finally, the provision also makes several miscellaneous amendments to other enforcement provisions of title 18. Among these is the adoption of a 10-year statute of limitations for offenses committed under section 1033. This provision reflects the conclusion of "Failed Promises" that more effective deterrence, detection, and punishment of those who perpetrate insurance fraud is critical to safeguarding the solvency of the insurance companies on which American policyholders rely.

There are few parts of the insurance fraud provision that may benefit from further explanation as to the intent of Congress in enacting them.

Section 1033(a)(1) would make if a federal crime to file material statements and reports with insurance regulators or to make overvaluations of land, property, or securities that are filed with regulators in an attempt to influence their decisions. This subsection incorporates that the false statements must be material to constitute an offense. This is intended to clarify that this subsection applies only to those statements or reports that are materially false in the sense that the statement could reasonably be expected to make a difference in the actions that the regulator takes in reliance on the

statement. For example, in the securities context, a material fact is one that could reasonably be expected to cause or to induce a person to invest or not to invest, *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976). See also *United States v. Palolicelli,* 505 F.2d 971, 973 (4th Cir. 1974). Similarly, under this subsection, a material fact is one that could reasonably be expected to lead an insurance regulator to take an official action.

In addition, the concept of materiality is embodied in the subsection (a) prohibition of overvaluations – that, by their very nature, involve elements of individual, subjective judgment. By employing the higher standard that the overvaluation be willful in order to constitute an offense under this subsection, it is intended, as is the case under this subsection with false statements, to incorporate the concepts of materiality described above. In fact, under the proposed statute, both the overvaluation offense and the false statement offense specifically require that they be done for the purpose of influencing the actions of regulatory officials in order to constitute an offense.

Section 1033(b)(1) makes the willful embezzlement or misappropriation of money or funds an offense punishable by up to 15 years in prison. A statute that requires an act to be willful in order to constitute a crime always requires that the necessary intent to commit the act and to violate the laws exist for the act to constitute a violation. Therefore, although it need not be stated in this provision because of the nature of the prohibited acts, "intent to defraud" is an essential element of any offense under this subsection.

Finally, section 1033(e)(1)(A) would exclude from the business of insurance those who have been convicted of any criminal felony involving dishonesty or breach of trust. The term "convicted" is intended to mean a conviction which is final and for which all direct appeals have been exhausted or waived or for which the time in which to file such appeals has lapsed. See, for example, *Martinez-Montoya v. INS,* 904 F.2d 1018 (5th Cir. 1990); In re Ming, 469 F2d 1352 (7th Cir. 1972) and *State v. Bridwell,* 592 F.2d 520 (Okla. 1979).

Prosecution, conviction, and incarceration have proven to be very effective in deterring white collar crime, yet most people involved in recent cases of obvious wrongdoing at insolvent companies simply walk away with no real investigation of their activities. Many of them continue to be active in the insurance business. It is clear that the current criminal statutes and penalties are inadequate to deal with this fraudulent activity, and that there are insufficient resources being devoted to criminal enforcement of insurance fraud at the State level.

I would like to note that the National Association of Insurance Commissioners, the National Conference of State Legislators, the National Association of Casualty & Surety Agents, the National Association of Professional Insurance Agents, and the National Association of Mutual Insurance Companies have all called for a Federal criminal statute to help insurance regulators deal with the inter-state and sometimes international nature of many insurance fraud schemes that drive insurance companies into insolvency.

Insurance is truly an interstate and international business and abuse of insurance companies has also become interstate and, in some cases, international. This new Federal insurance fraud prevention bill will be a strong enforcement tool to bring a stop to criminal fraud in the business of insurance.

I want to thank my colleague, Chairman BROOKS, and the Judiciary Committee for including this insurance fraud provision in H.R. 3371, and I urge its enactment by the House.

## ATTACHMENT E

## FDIC STATEMENT OF POLICY

The Federal/State Coordinating Working Group of the Anti-Fraud (G) Task Force of the NAIC has reviewed a statement of policy provided by the FDIC concerning its positions on interpreting a federal law which contain elements similar to 18 U.S.C. Sections 1033 and 1034. The FDIC statement of policy [on 12 U.S.C. 1829] is found at 63 Federal Register 230, 66177 and the following summarizes some of the same:

## MINIMAL INDUSTRY STANDARDS

At minimum each institution should institute a screening process to uncover information regarding a company applicant or potential independent contractor's convictions, which would include, for example, a written application listing such convictions, although other alternatives may be appropriate.

## DEFINING DISHONESTY AND BREACH OF TRUST

"Dishonesty" means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest. "Breach of trust" means a wrongful act, use, misappropriation or omission with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

## WHETHER A CRIME INVOLVES DISHONESTY OR BREACH OF TRUST

The FDIC believes that whether a crime involves "dishonesty" or "breach of trust" must be determined from the statutory elements of the crime itself, rather than the factual circumstances surrounding a crime. To do otherwise would require insured institutions and the FDIC to analyze the factual background of every conviction, including such offenses as disturbing the peace. Records of a factual background are not available for many convictions.

**ATTACHMENT F**

**FURTHER DESCRIPTIONS AND EXAMPLES OF "DISHONESTY OR BREACH OF TRUST"**

In addition to Attachment E, and in light of the fact that 18 U.S.C. 1033 does not include a definition for "dishonesty or breach of trust", the purpose of this attachment is to supply further definitions of these terms and also provide examples of offenses that might fall under these definitions. We are providing these definitions and examples in an attempt to provide some type of uniformity to state's considerations and determinations of whether or not a particular state or federal crime triggers the prohibition contained in 18 U.S.C. 1033. It is important to note that the list of examples is a list of crimes provided by the various states. While these state crimes may have federal equivalents, the list contains state crimes which the working group felt involved dishonesty or breach of trust.

It is important to remember that it is essential to any determination as to whether or not a criminal offense contains an element of dishonesty or breach of trust to include a review of the criminal statute in question and the specific elements of that crime. Only through a thorough review of the statutory elements of a particular crime can a determination be made whether or not that crime would trigger the prohibitions contained in 1033. Even though crimes may be similar in name, their elements may vary from state to state.

**Dishonesty**

Listed below are some commonly found definitions for dishonesty: "Disposition to lie, cheat, deceive, or defraud; untrustworthiness; lack of integrity. Lack of honesty, probity or integrity and principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray; "Black's Law Dictionary 4th ed. 1991". Also see Tucker v. Lower, 200 KAN. 1, 434 P. 2nd 320.

"Want of honesty; lying, stealing, defrauding. Something more than mere negligence, mistake, error of judgment, or competence. Not necessary such conduct as imports a criminal offense." Ballentine's Law Dictionary 1969.

**Breach of Trust**

Listed below are several examples of various definitions for the offense of breach of trust: "trustees violation of either the trust terms or the trustees general fiduciary obligations; the violation of a duty that equity imposes on a trustees, whether the violation was willful, fraudulent, negligent, or inadvertent." Black's Law Dictionary (7th ed. 1999).

"The elements which constitute breach of trust with fraudulent intent are not outlined in the statute governing the offense. However, the crime has been defined through the development of case law. Breach of trust with fraudulent intent is larceny after trust, which includes all the elements of larceny or in common parlance, stealing, accept the unlawful taking in the beginning. Thus, the primary difference between larceny and breach of trust is that in common law, larceny, possession of the property stolen is obtained unlawfully, while in breach of trust, the possession is obtained lawfully." See State v. Jackson, 527 SE 2nd 367 (S.S. APP. 2000).

**Examples**

It is important to remember that the crime in question must be a felony conviction to trigger the prohibition.

Below is a listing of criminal offenses which may be qualified offenses for the purposes of 18 U.S.C. 1033.

1. Arson
2. Bribery
3. Bribe receipt
4. Burglary
5. Car Jacking
6. Conspiracy
7. Crimes Against Children
8. Criminal Impersonation
9. Criminal Solicitation
10. General Fraud
11. Extortion
12. Forgery
13. Fraudulent Conveyance of Property
14. Fraudulent Use of Credit or Debit Card
15. Insurance Fraud
16. Issuing a Bad Check
17. Kidnapping
18. Making False Statements to Obtain Workers Compensation Benefits
19. Perjury
20. Possession of a Forged Instrument
21. Receiving Stolen Property
22. Robbery
23. Sale or Distribution of a Controlled Substance
24. Sexual Abuse
25. Theft by Deception
26. Theft of Property
27. Theft of Services
28. Witness/Evidence Tampering

There has been concern that serious crimes including many crimes of violence such as; manslaughter, rape, unlawful sexual conduct, and murder, may not contain an element of dishonesty or a breach of trust and despite their seriousness may not be a trigger for this prohibition status. Despite the fact they may not contain dishonesty or a breach of trust, they may well be statutory disqualifiers under your state licensing laws.

**OTHER RELATED LEGISLATION**

As further guidance, recent pending legislation may be helpful. On November 6, 2001, the U.S. House of Representative adopted the Financial Services Anti-Fraud Network Act (HR 1408) (The Act). The Act advises that certain types of convictions (defined as "relevant information") will be provided by the FBI to state insurance regulators when conducting background investigations on persons engaged in the business of conducting financial activity. The Act defines " relevant information" as:

**"Relevant Information"**

1. All felony convictions
2. All misdemeanors convictions involving:
   A. Financial activity
   B. "Dishonesty or breach of trust," as per 18 U.S.C. 1033, including taking, withholding, misappropriating, or converting money or property,
   C. Failure to comply with child support obligations,
   D. Failure to pay taxes
   E. Domestic violence/Child abuse
   F. Crimes of Violence
      1. Burglary of a Dwelling
      2. Threat of great bodily harm
      3. Use or attempted use of physical force
      4. Use, attempt, or threat to use a deadly weapon
      5. Murder, manslaughter, kidnapping, robbery, aggravated assault, forcible sex offenses, arson, extortion; (or attempts)

ATTACHMENT G

## DEPARTMENT OF INSURANCE PROCEDURES GOVERNING PERSONS SUBJECT TO 18 U.S.C. 1033

**(Drafting Note: These procedures are merely a model or guide for the implementation of 18 U.S.C. 1033. The various state insurance departments are free to either accept or reject, in whole or in part, the procedures set out herein.)**

## INTRODUCTION

The Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322, H.R. 3355; 18 U.S.C.§§1033-1034 ("the Act") became effective September 13, 1994. It provides criminal and civil enforcement provisions for insurance fraud committed by persons in the insurance industry. The Act also provides penalties for persons who have been convicted of certain prior criminal acts and who willfully engage in the business of insurance affecting interstate commerce, unless such person receives written consent from the appropriate regulatory official. The Act has broad, far-reaching implications for persons involved in the business of insurance or reinsurance in the United States. Insurers, officers, directors, agents and any employee of an insurance company engaged in the business of insurance could be subject to the requirements of this Act.

It appears to cover all acts necessary or incidental to the writing of insurance or reinsurance and the activities of persons who act as or are officers, directors, agents or employees and includes those authorized to act on their behalf.

The Act's insurance fraud provisions define the crimes and authorize the U.S. Attorney General to bring civil or criminal actions against offenders.

## PERSONS REQUIRED TO OBTAIN WRITTEN CONSENTS TO ENGAGE IN THE BUSINESS OF INSURANCE

One of the provisions of the Act prohibits **any person convicted of any criminal felony involving dishonesty, breach of trust or a violation of this Act from engaging in the business of insurance in interstate commerce without the specific written consent of the appropriate state insurance regulatory official.**

In essence, on September 13, 1994, a person is prohibited, and it has become **illegal** for an individual convicted of a crime involving dishonesty, breach of trust or a violation of this Act **to work or continue to work** in the business of insurance affecting interstate commerce without receiving written consent from an insurance regulatory official authorized to regulate the insurer, which we have interpreted to mean the Commissioner of Insurance. A prohibited person who works or continues to work without a written consent risks federal criminal and civil sanctions. **The Act contains no grandfather provision for persons already transacting the business of insurance. Further, the Act contains no automatic waivers for individuals who may possess a state insurance license. Further, there is no time limitation on how far back the felony conviction that triggers the prohibited person status may have occurred.**

Section 1033(e)(2) provides the framework, and the Department has a procedure, for a prohibited person to seek approval and written consent to transact the business of insurance.

The definition of a prohibited person may include, but is not limited to, any insurance agency or insurance company employee, agent, solicitor, broker, consultant, third-party administrator, managing general agent, or subcontractor representing an agency or company who engages or participants in the business of insurance, as it affects interstate commerce, and as defined by this Act. These individuals are required to submit a written request to the Commissioner of Insurance for permission to transact the business of insurance in this state, and receive written consent or risk federal criminal prosecution. **This includes currently licensed persons who do not have a written consent. The prohibited person is responsible for applying for and receiving written consent.**

Persons who fail to comply with this Act face federal sanctions, including fines and/or imprisonment. The mere granting of a license does not constitute an 18 U.S.C. §1033 exemption.

The state statutory licensing qualifications and requirements are totally separate from any federal restrictions or requirements under 18 U.S.C. §1033. Failure to inform the Department of a prior felony conviction on a license application could result in a violation of this statute, as well as constitute a separate ground for denial of an insurance license under state licensing laws.

Insurance companies, as well as persons employing individuals to conduct the business of insurance may be in violation of this statute if they willfully permit participation by a prohibited person, including persons who are currently employed or being considered for employment. Failure to initiate a screening process in an attempt to identify prohibited persons in current or prospective employment relationships may be a factor in determining if a violation of this statute has occurred.

**HOW TO SEEK CONSENT**

The prohibited person shall make a request for written consent to the commissioner. The person shall complete any forms or applications necessary to comply with the Department's procedure for granting a written consent.

**GRANTING CONSENT**

18 U.S.C. §1033(e)(2) gives complete authority to "*...any insurance regulatory official authorized to regulate the insurer,...*" to grant or withhold written consent. (See Section 3A, Jurisdiction.) Decisions of whether or not to grant consent to engage in the business of insurance, to a prohibited person meeting the requirements of this Act, will be handled on a case-by-case basis. Factors that will be considered include, but are not limited to:

1. the nature and severity of the conviction;
2. date of the conviction;
3. the injury and/or loss caused by the act for which the prohibited person was convicted;
4. whether the crime related to the business of insurance;
5. whether the prohibited person received a pardon from the sovereign that convicted him;

6. whether the prohibited person completed a parole or probation;
7. the nature and strength of any character letters;
8. the prohibited person's business and personal record before and after the commission of the crime;
9. whether and to what extent the person has made material false statements in an application,
10. renewal or in other documents filed with the Commissioner; and
11. whether and to what extent the prohibited person has made material false misstatements in
12. applications or other documents filed with other state or federal agencies.

**HOW TO APPLY FOR WRITTEN CONSENT**

All application packets submitted must include:

1. Completed initial application for written consent. The application should be filled out completely and truthfully. If you have any questions, please contact the Department's [insert appropriate division] .

2. A current credit report, certified by a credit bureau. The report must be certified by them. The report must accompany your application. A current credit report is one that was prepared within 30 days of the date of your application.

3. A copy of the completed form (or letter) requesting release of a complete record of convictions from the [insert appropriate state agency – official state repository of criminal history information]. The original form should be mailed directly to them with a check for (fee charged for service).

4. Two 2" by 2", black and white recent passport photographs attached to the upper right hand corner of the first page of the application for written consent.

It is the responsibility of the applicant to read the application in its entirety. Every question must be answered completely. Absolute and complete candor is required. Failure to complete the application may result in delay or denial of consideration for written consent. The purpose of the application is to provide you with an opportunity to demonstrate that, notwithstanding the federal bar, you are fit to participate in the business of insurance without being a risk to consumers or insurers. The burden is upon you to establish that your application warrants approval.

Answers must be typewritten; otherwise it will be returned.

Retain a copy of the application for your records. An amendment to the application must be filed immediately upon the occurrence of any event which would change any answer on the application. Failure to file a timely amendment may result in denial of written consent or withdrawal of previously granted consent.

# DEPARTMENT OF INSURANCE PROCEDURES GOVERNING PERSONS SUBJECT TO REQUIREMENT FOR WRITTEN CONSENT UNDER 18 U.S.C. SECTION 1033

## I. Introduction

These procedures are designed to provide employees of the Department of Insurance ("DOI") with a guide for dealing with all persons prohibited by 18 U.S.C. §1033 from working in the business of insurance without permission from the appropriate state regulator.

## II. Department of Insurance's 18 U.S.C. § 1033 Advisory Committee ("Committee")

The DOI has established a 1033 Advisory Committee to review applications and provide recommendations to the Commissioner regarding the fitness of a prohibited person to work in the insurance industry.

### A. General Responsibilities of the Committee

The Advisory Committee shall be responsible for:

1. ensuring that these uniform procedures are implemented and followed;
2. ensuring that all applicable federal and state laws and rules are followed;
3. promoting consistency and fairness in all DOI decisions involving requests for written consent under 18 U.S.C. §1033;
4. reviewing all applications received;
5. ensuring that applications that have been submitted are complete; and
6. making recommendations to the Commissioner regarding applications for the written consent.

### B. Membership of the Committee

Members shall be appointed and serve at the pleasure of the Commissioner or his designee. The Committee shall consist of the General Counsel, who shall chair the committee, two Associate Counsels, the Deputy Commissioner of Insurance, the Deputy Commissioner of Consumer Affairs, the Deputy of Agents' Licensing and the Chief of Financial Examination. [This will vary with each State's circumstances and departmental structure.]

### C. Committee Meetings

The Committee shall meet once a month, or as needed, to review all matters falling within its jurisdiction.

### D. Powers of the Committee

The Committee shall review and discuss matters referred to it and shall forward its recommendations to the Commissioner. The Committee does not nor does its recommendations affect or set public policy.

### E. Administration of the Committee

The Committee shall appoint a Secretary who shall maintain records of all Committee meetings and actions. The secretary does not have to be a member of the Committee.

The Committee shall appoint an Administrator. The Administrator shall be responsible for gathering information, producing summary reports, and maintaining and distributing applications referred to the Committee during the month preceding its meetings. The Administrator shall also be responsible for the forwarding of the Committee's recommendations, notifying the applicant of the status of their request, scheduling hearings and the preparation of orders.

If applicable, the Committee shall notify the employer or the prospective employer of the applicant that it has received an application for written consent. It shall further notify the employer or prospective employer of the Committee's final determination. The Administrator shall also ensure that the aforementioned documents and proceedings comply with state public record laws.

The Administrator shall notify other states of pending applications and the Commissioner's findings and actions.

## III. General Procedures for Handling Requests for Written Consent under 18 U.S.C. §1033

**Jurisdiction**

The Department of Insurance shall have jurisdiction under 18 U.S.C. §1033 to consider requests for written consent filed by the following persons:

1. officers, directors and employees of domestic insurance companies
2. other persons (e.g.; agents, third-party administrators, independent contractors, actuaries, reinsurers, brokers, underwriters, adjusters, etc.) who perform substantial insurance-related activities for a domestic insurance company or a resident licensee.
3. any person who maintains a resident license in this state (e.g., agents, managing general agents, adjusters, brokers, solicitors, customer service representatives, etc.).

The foregoing persons must obtain written consent only if they engage or participate in the business of insurance as defined in 18 U.S.C. §1033(f)(1):

1. the writing of insurance;
2. the reinsurance of risks;
3. all acts necessary or incidental to such writing or reinsuring; and, the activities of persons who act as, or are, officers, directors, agents, solicitors, brokers or employees of insurers, or who are authorized to act on behalf of such persons.

**Prerequisite for Application**

Applicants subject to the prohibitions set forth in 18 U.S.C. §1033 shall be required to obtain written consent from the Commissioner before any license application shall be considered. Since the federal statute does not contain a grandfather clause, even current licensees who are prohibited persons should not participate in the business of insurance without the Commissioner's written consent which specifically refers to 18 U.S.C. §1033.

When used herein, the term "license" shall be broadly construed to include any license, registration, certificate of authority or other permit or approval issued or granted by the Commissioner; and the terms "licensee", "application" and "applicant" shall follow the definitions set out in the Insurance Code.

**Application Forms for Requesting Written Consent Under 18 U.S.C. §1033(e)**

The DOI has developed two standardized applications for persons seeking written consent under 18 U.S.C. §1033. They are the "Short Application Form" and the "Comprehensive Application Form". These applications require a notarized signature of the person submitting the application and shall state that the information provided therein is truthful and complete.

**Short Application Form**

The short application form will be sent to applicants in cases where the Department is unable to determine whether or not that person could or does constitute a threat to the public. The Committee shall review the short form and make a recommendation to the Commissioner as to whether the applicant, as a result of the work he/she does in the insurance industry, does or could constitute a threat to the public. If a determination is made that the applicant does not pose a threat to the public, and the employer verifies the applicant's responsibilities, it shall be the Committee's recommendation to grant exemptions in these cases. The intent of §1033's prohibition is to prevent certain persons from having the opportunity to harm the public or insurers.

**Comprehensive Application Form**

If the Committee determines, after discussing this matter with the applicant or after reviewing a short application, that the person does or could constitute a threat to the public, the comprehensive application form will be sent to the applicant for completion.

A comprehensive application form will be required in cases where the Department determines that the position the person holds does or could constitute a threat to the public. All agents will be required to submit the comprehensive application forms.

If a comprehensive form is required to be submitted, and the applicant has previously filed a short form with the Department, any duplicative answers or attachments may be disregarded. Upon receipt of the comprehensive form the Department may wish to request additional information. Based on a review of the information, the Committee shall make a recommendation to the Commissioner regarding the granting or denying of the written consent.

The burden of persuasion and evidence for going forward with a request for written consent (hereinafter referred to as an "application") is on the prohibited person seeking the relief.

It is further the prerogative of the Committee to withhold any recommendation until after a hearing if the Committee feels the record is incomplete, additional information needs to be obtained or that the Committee has questions regarding any aspect of the application.

**Requirement for Character References**

Written character references may be submitted to the DOI. References shall state how long and in what capacity the writer has known the applicant. The person providing the reference shall also state that he/she is aware the reference is being provided in connection with a request for written consent to engage or participate in the business of insurance despite the existence of a felony criminal conviction or guilty plea.

**Requirement to Provide Documents**

All persons subject to 18 U.S.C. §1033 shall, within 30 days of receipt of a request from the Department, submit certified copies of all relevant court documents, and must submit any additional documents requested by the Department. The applicant may also provide any other documents or information that he/she would like to be considered by the Department.

**Committee Recommendations to the Commissioner**

A majority of the Committee members shall vote to either recommend granting or denying a written consent to work in the insurance business. If the recommendation is to grant consent the Committee will so notify the Commissioner of its recommendation.

If it is the Committee's determination that the person does not constitute a threat to the public and a written consent , which is specific as to the responsibilities and duties of the applicant at the time the application for written consent is made, should be granted they will so notify the Commissioner and the applicant. Drafting Note: Such a written consent is not employer specific. The applicant may switch jobs so long as his or her duties do not change.

If the determination is made that the applicant does or could constitute a threat to the public:

(a) If it is the Committee's recommendation to grant the written consent the Committee shall notify the Commissioner and the applicant in writing, including the reasons on which they are basing their recommendation to grant.

(b) If it is the Committee's recommendation to deny the written consent the Committee shall notify the Commissioner and the applicant in writing, including the reasons on which the recommendation is based.

In every instance where a determination is made by the Committee that the applicant does or could constitute a threat to the public and regardless of the Committee's recommendation a hearing will be held before a ruling is issued.

3. **If it is determined that the applicant is not subject to 18 U.S.C. 1033 the committee shall recommend that the applicant be so notified.**

**Hearings and Burden of Proof**

All hearings conducted by the Department with regards to 18 U.S.C. §1033 shall be conducted in accordance with this procedure guide. Anything not covered by this Guide shall be conducted in accordance with departmental Regulations set out in the [cite specific department rule or statute].

The burden of proof in a §1033 proceeding shall be the same as that applied in a departmental administrative proceeding specifically set out [cite specific department rule or statute]. As a general rule, the party asserting an affirmative issue has the burden of proving said issue by [insert applicable state law as to burden of proof].

The burden of persuasion and production of evidence for granting a request for written consent is on the prohibited person seeking the relief.

The prohibited person shall pay all costs associated with this proceeding, including but not limited to the costs of the presence of a court reporter at all departmental hearings and/or meetings concerning his application.

As stated previously, if it is the Committee's finding the person does or could constitute a threat to the public an administrative hearing will be held.

The applicant will appear before the Commissioner, be sworn in and present information as to why a written consent should be granted. The Commissioner or the Committee may ask questions of the applicant during this proceeding.

The applicant should be prepared to present evidence in response to the Committee's concerns outlined in the correspondence.

Recommendations made to the Commissioner by the Committee have no binding authority on the Commissioner and are merely advisory in nature.

**Written Consent**

All written consents granted by the Commissioner shall be conditioned upon the truth and veracity of the documents and information submitted by or on behalf of the person making the request. In the event the person receiving the written consent has made materially false or misleading statements or has failed to disclose material information, the consent shall be void ab initio. Further, the providing of false information would constitute a violation of 18 U.S.C. §1033.

The Commissioner may choose to grant a temporary consent at his or her discretion. Upon expiration of the consent the applicant would be in violation of 18 U.S.C. §1033 if the applicant engaged in any insurance activity without first receiving a new consent.

All written consents granted by the Commissioner shall be specific as to job responsibility and conditioned upon the person remaining in a similar position with the same duties. A change in duties will necessitate the filing of a new request for written consent. In the event the person receiving the written consent has been given significantly increased job duties and has not so informed DOI, the consent shall be immediately invalidated as a matter of procedure. A change in employer or a line of business with the same duties may not necessitate an additional consent.

(Drafting Note: Applicants should be informed that they are obligated to inform the commissioner of any change in their job duties.)

In the event a person has violated the terms of a written consent, the consent will be invalidated and the person engaging in the business of insurance is prohibited by 18 U.S.C. §1033. In the event such person is licensed by DOI, the matter shall be referred to the [insert appropriate division] for a filing of a revocation action.

**Denial of Request for Written Consent Filed by Licensee**

No person shall be granted a license or shall be permitted to retain a license or shall participate in the business of insurance if the request for a written consent has been denied. A denial of the request shall be reported to all regulators on the 1033 written consent e-mail notification list.

**Subsequent Convictions of Persons Previously Granted Written Consent**

Any person granted written consent to participate in the business of insurance shall immediately notify the DOI and their employer and, if an agent, all their appointed insurers if convicted of a felony during or subsequent to receiving a written consent. The consent previously issued is void ab initio. The person shall inform the Department of the existence of any such felony offenses and shall provide all relevant documents and information.

## I. Procedures with Respect to Persons Subject to 18 U.S.C. §1033

### A. Reporting Criminal Convictions of Licensees

The Legal Division shall assist the Committee in obtaining information on any applicants or persons already licensed by the Department (or corporate officials of an applicant or licensee) who have been convicted of any criminal offense enumerated in 18 U.S.C. §1033.

If the Committee or any other division determines that a material false statement concerning the criminal history of the person has been made on the 1033 application, or on a license application, or renewal, the Committee shall immediately refer the matter to the [insert appropriate division] . The [insert appropriate division] shall make an independent determination as to whether an investigation should be pursued and/or a criminal referral made.

The Committee or the Department may request that the Legal Division refer to the appropriate law enforcement entity (or the appropriate division) a licensee or applicant who is in violation of §1033 or is in violation of any other penal statute as it pertains to not reporting criminal felony convictions involving dishonesty or a breach of trust.

### A. Applicants and Licensees Subject to 18 U.S.C. §1033

In the event the applicant or licensee (or corporate official of an applicant or licensee) is subject to the prohibitions set forth in 18 U.S.C. §1033 (a felony conviction involving dishonesty, breach of trust or any conviction under 18 U.S.C. §1033), the [insert appropriate division] shall:

1. inform the person and their employer of the criminal offense set forth in 18 U.S.C. §1033(e)(1);
2. inform the person that pursuant to 18 U.S.C. §1033(e)(2), a written consent from the Commissioner is required;
3. inform the person that any such request for written consent must be made within 30 days of receipt of the notification.

The foregoing notification shall be made in writing via certified mail, return receipt requested, and shall include a copy of the standard form for requesting written consent. In cases involving corporate officials, the said notification shall be sent to both the company and the corporate official.

In the event a question arises as to whether a particular criminal offense is covered by 18 U.S.C. §1033(e), whether a particular employee is subject to the prohibitions set forth in 18 U.S.C.§1033(e), or whether 18 U.S.C §1033(e) applies to a particular fact situation, the written question shall be referred to the Committee. The Committee shall make a determination as to the applicability of 18 U.S.C. §1033(e) and shall so inform the referring DOI division or individual/ entity requesting the opinion.

B. **Failure to File Documents**

If the applicant subject to 18 U.S.C. §1033 and/or the agency or company he represents or a licensed agent or corporate official of a licensee fails to file requested documents or information within 30 days after initiating the request for regulatory consent or after additional requests for information sent by certified mail, return receipt requested, by the Committee, the request for written consent and the application shall be considered withdrawn and referred to the [insert appropriate division] for appropriate action, including but not limited to, the revocation of license.

C. **Referrals to the Committee**

All departmental divisions shall forward to the Committee any requests it receives for written consent under 18 U.S.C. §1033.

All departmental divisions shall refer any individuals they discover through whatever means that may be prohibited persons.

All departmental divisions shall immediately forward to the Committee any matter in which material false statements concerning a person's criminal history may have been made on an application or renewal, regardless of whether the conviction has been set aside or whether a pardon has been granted.

D. **Review by the Committee**

Upon receipt by the Commissioner of a timely and complete application, the Committee shall review the same in light of the following guidelines:

1. The Committee shall consider the factors set forth in the Insurance Code in making its recommendation.
2. The Committee shall also consider any relevant additional factors in making its recommendation.
3. The Committee shall consider whether and to what extent the person has made material false statements in applications or other documents filed with other state agencies.
4. The Committee may consider charges that were nolle prossed.
5. The Committee may consider convictions resulting from arrests, the records of which have been expunged.
6. The Committee may consider convictions for which a pardon has been granted unless the circumstances indicate that the pardon was granted due to the innocence of the person involved.
7. Requests for written consent shall be granted only if the mitigating circumstances clearly and substantially outweigh the seriousness of the criminal history together with any other aggravating circumstances.

## I. Definitions (These definitions may differ depending on case law and state statutes)

### A. Breach of Trust

"Breach of trust" is not defined in 18 U.S.C. §1033. Crimes involving breach of trust shall include, but not be limited to, any offense constituting or involving misuse, misapplication or misappropriation of (1) anything of value held as a fiduciary (including, but not limited to, a trustee, administrator, executor, conservator, receiver, guardian, agent, employee, partner, officer, director or public servant) or (2) anything of value of any public, private or charitable organization.

### B. Business of Insurance

"Business of Insurance" is defined in 18 U.S.C. §1033. Under this law, the "business of insurance" means: (1) the writing of insurance, or (2) the reinsuring of risks, by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons. 18 U.S.C. §1033(f)(1).

### C. Dishonesty

The term "dishonesty" is not defined in 18 U.S.C. §1033. Crimes involving dishonesty shall include, but shall not be limited to, any offense constituting or involving perjury, bribery, forgery, counterfeiting, false or misleading oral or written statements, deception, fraud, schemes or artifices to deceive or defraud, material misrepresentations and the failure to disclose material facts.

### D. Corporate Official

As used in these procedures, the term "corporate official" shall mean any officer, director, agent, solicitor, broker or employee of a corporation.

### E. Insurer

"Insurer" is defined in 18 U.S.C. §1033 as any entity the business of which is the writing of insurance or reinsuring of risk, and includes any person who acts as or is an officer, director, agent, or employee of that business.

### F. Interstate Commerce

"Interstate commerce" is defined in 18 U.S.C. § 1033 as commerce within the District of Columbia, or any territory or possession of the United States; all commerce between any point in the State, territory, possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State or; all other commerce over which the United States has jurisdiction.

**G. State**

"State" is defined in 18 U.S.C. §1033 as any state, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands.

**H. License and Licensee**

"License" shall mean any license, registration, certificate of authority or other permit or approval issued or granted by the Commissioner of Insurance, and "licensee" shall mean any person or entity holding a license as required by the Insurance Code.

**I. Application or Applicant**

"Application" shall mean any filing made with the Commissioner of Insurance or the Department of Insurance for a license and "applicant" shall mean any person or entity filing an application.

**ATTACHMENT H**

**APPLICATION (LONG FORM)
FOR WRITTEN CONSENT
TO ENGAGE IN THE
BUSINESS OF INSURANCE
PURSUANT TO 18 U.S.C. § 1033 AND 1034**

Notice to Applicant - 18 U.S.C. § 1033 prohibits certain activities by or affecting persons engaged or proposing to become engaged in the business of insurance.

(e)(1)(A) Any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business, shall be fined as provided in this title or imprisoned not more than 5 years, or both.

(B) Any individual who is engaged in the business of insurance whose activities affect interstate commerce and who willfully permits the participation described in subparagraph (A) shall be fined as provided in this title or imprisoned not more than 5 years, or both.

(e)(2) A person described in paragraph (1)(A) may engage in the business of insurance or participate in such business if such person has the written consent of any regulatory official authorized to regulate the insurer, which consent specifically refers to this section.

This Application will be reviewed by the chief insurance regulatory official in this state to determine whether the Applicant should be given written consent to engage in the business of insurance or participate in the business pursuant to 18 U.S.C. § 1033(e)(2).

You must answer every question on the Application. If a question does not apply, indicate N/A in the space provided for the answer. Your answers are not limited to the space provided on the Application. Attach additional pages as needed. The Department of Insurance will not process incomplete Applications. Additional information may be requested. If you have previously completed the *Short Form Application for Written Consent to Engage in the Business of Insurance*, you do not need to provide duplicate photos or attachments.

*PLEASE TYPE*

Submit Two Identical Photos

## SECTION I – APPLICANT INFORMATION

**Full Name of Applicant:**

| Last Name | First Name | Middle | SS# |
|---|---|---|---|
| | | | |

| Home Address | City | County | State | Zip | Home Phone |
|---|---|---|---|---|---|
| | | | | | |

| Business Address | City | County | State | Zip | Business Phone |
|---|---|---|---|---|---|
| | | | | | |

1. If you were born in the United States, provide the following:

| Place of Birth | City | County | State | Zip | Date of Birth |
|---|---|---|---|---|---|
| | | | | | |

2. If you were not born in the United States, provide the time of first entry and port of entry:

3. Are you a U.S. Citizen? ☐ yes ☐ no
If no, provide the following:

| Citizenship Country | State/Province | Basis of U.S. Residence | Alien Registration Number |
|---|---|---|---|
| | | | |

4. If you are a naturalized citizen of the United States, indicate where and how you became naturalized. The number of the Certificate of Naturalization must be provided, if applicable.

5. Have you ever used or been known by another name (including maiden name) or used or been issued another social security number? ☐ yes ☐ no
If yes, provide the following (attach additional pages as needed):

| Name | Social Security Number | Date of Use |
|---|---|---|
| | | |

6. Provide identification of your current, and all former, spouses (attach additional pages as needed):

| Spouse's Last Name | First Name | Middle | Social Security Number | Marital Status |
|---|---|---|---|---|
| | | | | |

7. Do any of your relatives, by blood or marriage (either current or prior), serve in any capacity with any entity engaged in the business of insurance? ☐ yes ☐ no
If yes, provide the following (attach additional pages as needed):

| Name of Relative | Address | Relationship to Applicant | Insurer/Employer |
|---|---|---|---|
| | | | |

8. **Have you ever been a party, in any capacity, in a civil action, lawsuit, bankruptcy or other proceeding? ☐ yes ☐ no**

**If yes, provide details of all civil actions (attach additional pages as needed):**

**Title of Case** **Case Number**

☐ **Federal** ☐ **State**

**Identification of Court** **City/State** **Date of Action**

**Description of case and your involvement, including outcome:**

*SECTION II – EDUCATION*

1. **Provide complete details about your education and training, including identification of all schools that you have attended. Attach additional pages as needed.**

| | | | | |
|---|---|---|---|---|
| **Name of High School(s)** | **Address** | **Major** | **Dates Attended** | **Highest Level Attained** |
| **Name of College(s)** | **Address** | **Major** | **Dates Attended** | **Highest Level Attained** |
| **Name of Tech School(s)** | **Address** | **Major** | **Dates Attended** | **Designation** |
| **Post Graduate Schools or Programs** | **Address** | | **Dates Attended** | **Designation** |

*SECTION III – CHRONOLOGICAL EMPLOYMENT HISTORY AND PROFESSIONAL LICENSES – CERTIFICATIONS – DESIGNATIONS*

1. **List in chronological order each and every place where you have been employed, including any military service (attach additional pages as needed). Include all instances where you have served as a paid or non-paid officer or director.**

| Name of Employer | Address | Title/Job | Employment Dates | Reasons for Leaving |
|---|---|---|---|---|
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2. Do you now hold, or have you ever held, a professional license relating to the business of insurance, including but not limited to, being a producer, agent, broker, solicitor, adjuster, or third party administrator? ☐ yes ☐ no
If yes, provide the following information about your active or prior insurance professional license(s) (attach additional pages as needed):

| Type of License | Date of Issue | State | Status of License |
|---|---|---|---|

3. Have you ever had a consumer complaint, administrative, civil or other legal proceeding (include pending actions) filed against you regarding your insurance activities? ☐ yes ☐ no
If yes, provide the following (attach additional pages as needed):

| Type of Action | Court/Administrative Agency | State | Date of Action | Outcome |
|---|---|---|---|---|

4. If your insurance-related license has ever been suspended, revoked, or administratively sanctioned (include pending actions) as a result of the legal or administrative action described in this section, provide the following information (attach additional pages as needed):

| Date of Sanction/Suspension/Revocation | Type of License | Fines Paid | Status of Proceeding |
|---|---|---|---|

5. Do you now hold, or have you ever held, any other professional licenses, certifications or designations not issued by a Department of Insurance? ☐ yes ☐ no
If yes, provide the following information about your active or prior professional licenses, certifications or designations (attach additional pages as needed):

| Issued by | Address | City/State |
|---|---|---|

| Type of License, certification or designation | Date of Issue | Status of license, certification or designation |
|---|---|---|

6. Have you ever had a customer, client or consumer complaint, administrative or other legal proceeding (include pending actions) filed against you regarding your other professional activities? ☐ yes ☐ no
If yes, provide the following (attach additional pages as needed):

| Type of Action | Court/Administrative Agency | State | Date of Action | Outcome |
|---|---|---|---|---|

7. If any other professional licenses, certifications or designations have ever been suspended, revoked, or administratively sanctioned as a result of the legal or administrative action described in this section (include pending actions), provide the following information (attach additional pages as needed):

| Date of Sanction/Suspension/Revocation | Type of License | Fines Paid | Status of Proceeding |
|---|---|---|---|

## SECTION VI – CRIMINAL HISTORY

1. Provide a narrative statement describing the circumstances leading to all criminal charge(s) filed against you; the date of charge(s); place of charge(s); trial court(s); date of disposition; convicted charge(s); sentence(s); date(s) of incarceration; date(s) of probation/parole; date(s) of release from probation/parole; restitution ordered; restitution paid; fines/costs ordered; fines/costs paid. Include details of negotiated plea agreements and pleas of *nolo contendre* to an Information or indictment. Describe in detail the criminal conviction or convictions, which are the subject of this Application. Attach additional pages if needed.

3. Other than described in Section IV, No. 1, during your lifetime have you ever been charged, arrested, indicted, entered into a negotiated plea agreement, entered a plea of guilty or *nolo contendre* to an Information or indictment, had a sentence suspended or had pronouncement of a sentence suspended, in connection with any other felony or misdemeanor criminal activities? ☐ yes ☐ no

If yes, provide a narrative statement describing the circumstances of every instance.

**Drafting Note: In lieu of, or in addition to, the questions contained in Section IV, Nos. 1 and 2, the working group has prepared a summary chart (attached) that states may wish to consider for inclusion in the Application.**

3. Have you received any type of pardon to the offense or offenses that are the subject of this Application, or any other offense listed in this Application? ☐ yes ☐ no
If yes, provide the following information (add additional pages if needed):

| Pardoning Authority | County | State | Convicted Offense | Date of Pardon | Terms of Pardon |
|---|---|---|---|---|---|

4. Have your civil rights been revoked? ☐ yes ☐ no
If yes, provide the following information:

| Court of Judgment | Date of Revocation of Civil Rights | Date of Restoration of Civil Rights |
|---|---|---|

5. Have you made full payment of any and all outstanding court costs, supervision fees, fines and ordered restitution concerning any and all offenses? ☐ yes ☐ no
If no, provide explanation (add additional pages if needed):

6. *Are there mitigating or extenuating circumstances surrounding your commission of the offenses listed in Section IV? If yes, explain (attach additional pages as needed).*

7. List all evidence that exists regarding your rehabilitation (attach additional pages as needed).

## SECTION V – PRESENT/PROPOSED INSURANCE EMPLOYMENT

1. **Provide complete details about your present employment or business association/relationship with an entity engaged in the business of insurance (attach additional pages as needed):**

| *Name of Employer* | *Address* | *City* | *State* | *Zip* | *Telephone* |
|---|---|---|---|---|---|
| | | | | | |

| *Name of Insurance Entity* | *Address* | *City* | *State* | *Zip* | *Telephone* |
|---|---|---|---|---|---|
| | | | | | |

| Applicant's Direct Supervisor | Address | City | State | Zip | Telephone |
|---|---|---|---|---|---|
| | | | | | |

| Business Location of Applicant's Employment/Insurance Related Activity | Offices Held or Job Title |
|---|---|
| | |

2. **Describe in detail the nature, duties and activities of your present employment or business association/relationship with an entity engaged in the business of insurance, including office, position, occupation, trade, vocation, or profession (attach additional pages as needed):**

3. **Provide complete details about your proposed employment or business association/relationship with an entity engaged in the business of insurance (attach additional pages as needed):**

| *Name of Employer* | *Address* | *City* | *State* | *Zip* | *Telephone* |
|---|---|---|---|---|---|
| | | | | | |

| *Name of Insurance Entity* | *Address* | *City* | *State* | *Zip* | *Telephone* |
|---|---|---|---|---|---|
| | | | | | |

| Applicant's Direct Supervisor | Address | City | State | Zip | Telephone |
|---|---|---|---|---|---|
| | | | | | |

| Business Location of Applicant's Employment/Insurance Related Activity | Offices Held or Job Title |
|---|---|
| | |

4. **Describe in detail the nature, duties and activities of your proposed office, position, occupation, trade, vocation, or profession (attach additional pages as needed):**

5. **Explain why your conviction(s) will not effect your fitness or ability to perform any of the above duties or activities (attach additional pages as needed):**

6. List the names and locations of all insurers and entities providing services to insurers for which you have advised, represented or in any manner worked for or provided services to, together with a description of the activities performed for each such entity (attach additional pages as needed).

_____

_____

_____

7. Provide details of any proposed or current written or oral agreements, contracts or understandings between yourself and any entities engaged in the business of insurance (attach additional pages as needed).

_____

_____

_____

## SECTION VI – FINANCIAL INFORMATION

1. Attach financial statement(s) indicating your net worth, including all assets held by you, or held in the names of others for you, the amount of each secured and unsecured liability owed by you, or by you together with any other person.

2. Do you have any judicial or administrative penalties, fines or outstanding (include pending actions)?
☐ yes ☐ no
If yes, describe in detail (attach additional pages as needed):

_____

_____

3. Do you have any civil judgments, tax or other liens or penalties outstanding (include pending actions)? ☐ yes ☐ no

If yes, describe in detail (attach additional pages as needed):

_____

_____

**Drafting Note: States should consider the advisability of obtaining confirmation that the applicant has no relevant administrative fines, civil judgments, tax or other liens or penalties outstanding. States should also consider obtaining confirmation that the applicant has no past due or delinquent loans, child support or alimony.**

4. Attach a list indicating the amount and sources of all income for five (5) calendar years prior to the Application through the date of the Application.

**Drafting Note: States may wish to consider requesting income information for a period longer than five (5) years.**

5. Have you ever been in a position which required a fidelity bond? ☐ yes ☐ no
If yes, and any claims were made on the bond, provide details (attach additional pages as needed):

_____

_____

6. **Have you ever been denied an individual or position schedule fidelity bond, or had a bond cancelled or revoked? ☐ yes ☐ no**

**If yes, provide details (attach additional pages as needed):**

7. **Have you, or any business entity in which you served as an officer, director, trustee, investment committee member, key employee, stockholder or owner become insolvent, placed in bankruptcy, receivership, rehabilitation or liquidation? ☐ yes ☐ no**
**If yes, provide details (attach additional pages as needed):**

8. **List any and all entities (corporations, partnerships, sole proprietorships, trusts, etc.) engaged, directly or indirectly, in the business of insurance in which you hold directly or beneficially (or hold in joint tenancy, or in the name of others for you) a stock or other ownership interest. Include any option agreements to purchase or participate in an ownership interest (attach additional pages as needed):**

9. **List any and all entities (corporations, partnerships, sole proprietorships, trusts, etc.) engaged, directly or indirectly, in the business of insurance in which your relatives, by blood or marriage, hold directly or beneficially a stock or other ownership interest. Include any option agreements to purchase or participate in an ownership interest (attach additional pages as needed):**

## SECTION VII – GROUNDS RELIED UPON FOR APPLICATION FOR WRITTEN CONSENT

1. Provide a complete explanation of the reasons or grounds the applicant relies upon to establish that the applicant's insurance activities for which written consent is sought will not be contrary to the intent and purpose of 18 U.S.C. § 1033, and will not pose a risk to the insurance consumers or the insurance companies (attach additional pages if needed):

2. You may enclose letters of recommendation addressed to the insurance regulatory official in the state where the Application is being submitted, attesting to your character and reputation. These letters should indicate the length of time that the writer has known you, and should describe your character traits as they relate to the employment, position or activities for which written consent is sought. Each letter should indicate that it is being submitted in compliance with these procedures and that you have informed the writer of the factual basis of the Application being filed with the regulatory official and the purpose thereof.

3. Have you ever applied for written consent with any other Commissioner or equivalent? ☐ yes ☐ no

If yes, provide the following information, together with a copy of the Application filed in other state(s):

| Name of Commissioner | State | Date of Application | Outcome of Request |
|---|---|---|---|

## SECTION VIII – ATTACHMENTS

Attach the following documents to this Application for Written Consent. Applications without attachments, or Applications with incomplete attachments, will be returned to the applicant. However, if you have previously completed and submitted the *Short Form Application for Written Consent to Engage in the Business of Insurance,* you do not need to provide duplicate photos or attachments.

1. A certified copy of the applicant's criminal history.
2. A certified copy of the indictment, criminal complaint or other initiating document for the charge(s) which is(are) the subject of this Application.
3. A certified copy of the order of judgment and sentence of the Court for the conviction which is the subject of this Application (including certification of performance of all conditions imposed by the Court) and/or a certified copy of the Court docket.
4. A current financial statement and list of sources of income (as described in Section VI).
5. A current certified copy of applicant's credit report.
6. Copies of any and all current or proposed agreements between you and any entity engaged in the business of insurance.
7. A sworn affidavit from the president, or other designated officer or director of the insurer, that states: the basis under which the Affiant is authorized to execute and attest to the statements made in the affidavit; the applicant will in fact perform only those insurance activities as fully described in the Application; the Application is to the best of his/her knowledge and belief, true and correct; the applicant will not be placed in a position in which his/her activities will constitute a risk or threat to insurance consumers or the insurer.
8. A copy of any pardon.
9. Any other attachments that the insurance regulatory official deems appropriate.

The applicant may include the following evidence of rehabilitation for the Commissioner's consideration:

1. Post-conviction community service.
2. Post-conviction charitable activity.
3. Any other information the applicant believes will assist the Commissioner in determining whether to grant written consent.
4. Letters of recommendation, addressed to the insurance regulatory official in the state where the Application is being submitted, attesting to the character and reputation of the applicant. The statement shall indicate the length of time the writer has known the applicant, their business or social relationship, and should include a description of the applicant's character traits and reputation in the community. The recommendation shall also verify that the writer knows of the applicant's criminal history.

## SECTION IX – APPLICANT'S SWORN STATEMENT VERIFYING TRUTH OF INFORMATION IN APPLICATION AND AUTHORIZATION FOR RELEASE OF INFORMATION

[redacted]

_____
**Signature of Applicant** **Date**

**STATE OF** _____ )
)
**COUNTY OF** _____ )

**Subscribed, sworn to, and acknowledged before me by** _____ **to be his/her free act and deed this** _____ **day of** _____, **20**_____.

_____
**Notary Public, State at Large** **My Commission Expires**

**PROVIDE A LIFELONG LIST OF ALL CHARGES AND CONVICTIONS FOR FELONY OR MISDEMEANOR CRIMES, INCLUDING: CIRCUMSTANCES LEADING TO CRIMINAL CHARGE(S), DATE(S) OF CHARGE(S); COURT(S); DATE(S) OF DISPOSITION; CONVICTED CHARGE(S); SENTENCE(S); DATE(S)OF INCARCERATION; DATE(S) OF PROBATION/PAROLE; DATE(S) OF RELEASE FROM PROBATION/PAROLE; RESTITUTION ORDERED; RESTITUTION PAID; FINES/COSTS ORDERED; FINES/COSTS PAID. ATTACH ADDITIONAL PAGES, IF NEEDED.**

| Circumstances Leading to Charge(s) | Criminal Charge(s) and Date of Charge | Court | Date(s) of Disposition | Convicted Charge(s) | Sentence(s) | Date(s) of Incarceration | Date(s) of Probation/Parole | Release Date(s) from Probation/Parole | Restitution Ordered/Paid | Fines/Costs Ordered/Paid |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |

ATTACHMENT I

**SHORT FORM APPLICATION**

*TO ENGAGE IN*

**FOR WRITTEN CONSENT**

**THE BUSINESS OF INSURANCE PURSUANT TO 18 U.S.C. § 1033 AND 1034**

Submit Two Recent Identical Photos

Notice to Applicant: 18 U.S.C. § 1033 prohibits certain activities by or affecting persons engaged or proposing to become engaged, in the business of insurance:

(e)(1)(A) Any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business, shall be fined as provided in this title or imprisoned not more than 5 years, or both.

(C) Any individual who is engaged in the business of insurance whose activities affect interstate commerce and who willfully permits the participation described in subparagraph (A) shall be fined as provided in this title or imprisoned not more than 5 years, or both.

(e)(2) A person described in paragraph (1)(A) may engage in the business of insurance or participate in such business if such person has the written consent of any regulatory official authorized to regulate the insurer which consent specifically refers to this section.

This Application will be reviewed by the chief insurance regulatory official in this state to determine whether the Applicant should be given written consent to engage in the business of insurance or participate in the business pursuant to 18 U.S.C. § 1033(e)(2).

You must answer every question on the Application. If a question does not apply, indicate N/A in the space provided for the answer. Your answers are not limited to the space provided on the Application. Attach additional pages as needed. The Department of Insurance will not process incomplete Applications. Additional information may be requested.

*PLEASE TYPE*

## SECTION I - APPLICANT INFORMATION

1. **Full Name of Applicant:**

_____

**LAST NAME** **FIRST NAME** **MIDDLE**

**HAVE YOU EVER BEEN KNOWN BY OR USED ANOTHER NAME, INCLUDING MAIDEN NAME?** ☐ **YES** ☐ **NO**
**IF YES,**
**IDENTIFY:**_____

Home Address:_____
**Street Address** **City** **State** **Zip**

**Mailing Address:**_____
**P.O. Box or Street Address** **City** **State** **Zip**

**Home Telephone Number:**_____
**WORK TELEPHONE NUMBER:**_____

**SOCIAL SECURITY NO.**_____
**Have you ever used or been issued another social security number?**_____ **If so, provide an explanation and previous/other social security number(s)** _____

**PLACE AND DATE OF BIRTH:**_____

***(Answer all questions fully and completely. Failure to answer the questions fully will result in delays in the application process. You are not limited to the space below. Attach additional pages if needed).***

## SECTION II - CRIMINAL HISTORY

1. **List any felony(s) for which you have been arrested, charged, indicted, or convicted. Include details of any negotiated plea agreements and pleas of nolo contendre to an Information or indictment. Attach a full description of your acts involved in the aforementioned matters. Include dates of charge, location, and nature of offense. Attach additional pages if needed.**

_____

_____

_____

_____

_____

_____

2. **Provide details of the conviction for which you are seeking written consent and the final disposition of these matter(s) , including sentence; dates of incarceration; dates of probation/parole (if you are currently under probation/parole, include the name and phone number of person supervising your parole or probation; restitution paid; fines/costs ordered: fines/costs paid; and pardons granted. Include information as to whether or not your civil and political rights have been restored. Attach additional pages if needed.**

_____

_____

_____

_____

_____

_____

*SECTION III - PRESENT/PROPOSED INSURANCE EMPLOYMENT*

1. Please specify the name and address of your current or proposed employer to which the requested exemption will apply.

_____

_____

2. **Please describe in detail the office, position, and title. to which the requested exemption will apply and a complete description of the activities, duties and responsibilities. Please attach or describe any proposed or current written or oral agreements, contracts, or understandings with any entity engaged in the business of insurance as defined by 18 U.S.C. § 1033. (If consent is given, it will be applicable to the activities described herein.) Please include your date of employment or proposed date of employment.**

_____

_____

_____

_____

_____

_____

_____

*SECTION IV - ATTACHMENTS*

Attach the following documents to this Application for written consent. Applications without attachments, or applications with incomplete attachments, will be returned to the applicant.

1. **Certified copy of the applicant's criminal history.**
2. **Certified copy of the indictment, criminal complaint, or docket sheet or other initiating documents for the charge(s) which is the subject of this Application.**
3. **A certified copy of the order of judgment and sentence of the court for the conviction that is the subject of this Application, including certification of completion and performance of all conditions imposed by the court.**
4. **An affidavit from the individual that seeks to employ you stating in detail the duties and responsibilities that you are performing or are to perform for them and for which you seek written consent and that it is that individual's opinion that the performance of these responsibilities does not constitute a threat to the public.**

(name of applicant), swear under penalty of law that any statements in the foregoing Application, and the documents appended thereto, are true and correct and complete. I understand that my statements on the Application and the attachments to any Application will be relied upon by the Insurance Commissioner of the State of _____ in the execution of his or her duties under the Insurance Code, and 18 U.S.C. § 1033. I authorize a decision on the Application. I understand that if I have made any false statement in this Application or if there are any false statements included in the attachments to this Application, I may be criminally prosecuted under any state or federal or administrative remedies available and that any insurance license that I currently hold, or for which I have applied, will be subject to suspension or revocation. I further understand that these false statement(s) would also constitute a violation of 18 U.S.C. § 1033. For purposes of this Application, I do not contest the validity of any felony conviction upon which this request would be granted. By signing this application, I acknowledge that the Insurance Department of the State of _____ may conduct an independent investigation to confirm the information in this Application and, if I expressly consent and authorize any person, business or agency to release any information the Insurance Department may request as part of the investigation, including but not limited to, records of my former employment, state and federal tax returns, business records and banking records.

_____
**Signature of Applicant** **Date**

**STATE OF _____ )**
**)**
**COUNTY OF _____ )**

**Subscribed, sworn to, and acknowledged before me by _____ to be his/her free act and deed this _____ day of _____, 19_____.**

_____
Notary Public, State at Large My Commission Expires:

W:\CPROTECT\Antifraud\1033 Material\1033 Guidelines7-02.doc

NO. 07-30482

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA,

**Plaintiff-Appellant**

v.

THE LOUISIANA DIVISION OF ADMINISTRATIVE LAW THROUGH ITS DIRECTOR, ANN WISE

**Defendant-Appellee**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA,
CASE NO. 06-880-JUP-SCR

**John V. Parker, United States District Judge**

# NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS' BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL OF THE JUDGMENT BELOW

W. Shelby McKenzie, Bar No. 10020
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