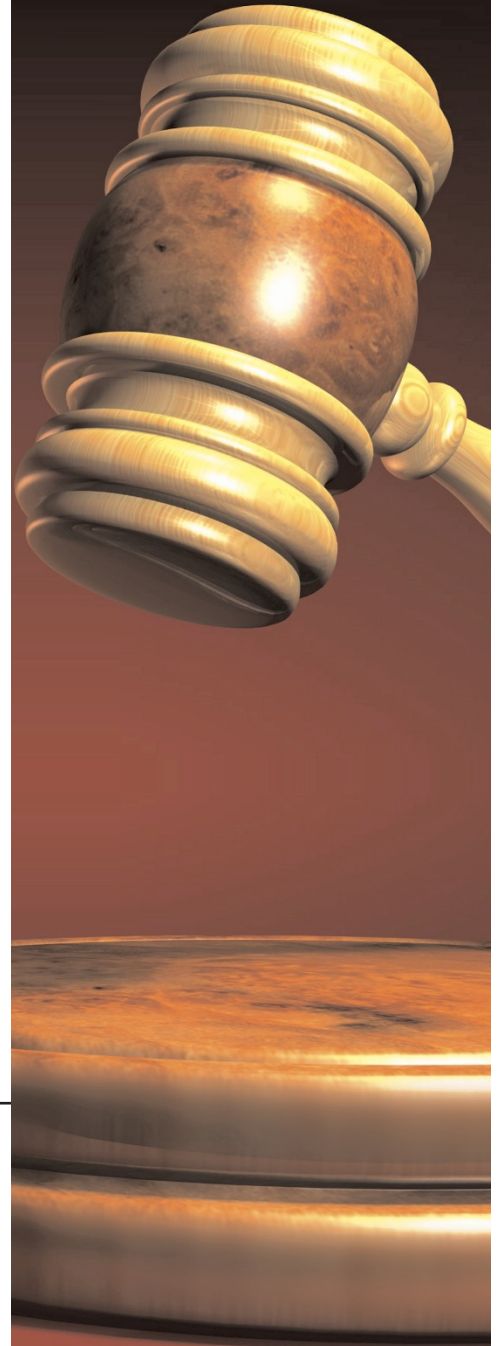


NAIC

National Association of Insurance Commissioners

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

18 U.S.C. §§ 1033–1034



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National Association of Insurance Commissioners

Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994: United States Code §§ 1033 – 1034

2011

NAIC Antifraud Task Force
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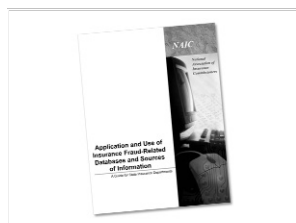
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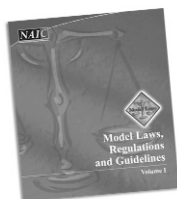
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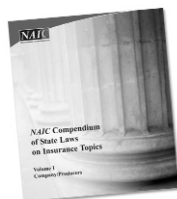
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PURPOSE

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 the “Guidelines”), provide a general overview of the concepts, principles and procedures that the Antifraud 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 important, 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 (i.e., 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. §§ 1033 and 1034 are solely within the discretion of the U.S. Department of Justice and the U.S. Attorney General’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 might 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 the 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 Task Force regarding the applicability or soundness of the interpretations and opinions herein.

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A. INTRODUCTION

On Sept. 13, 1994, President Bill 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 the U.S. Congress since April 1991. The Act is broad in application, even reaching to people and activities of reinsurers doing business in, or with, U.S. domiciled insurers. It is important to keep in mind, however, that the Act does not preempt or supersede applicable state laws, so that an individual who has been granted relief from the Act or whose criminal record does not trigger the Act in the first place, might still be barred from the insurance industry by state law.

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.
- 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 18 U.S.C. § 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 (1) to fifteen (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’s Office 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 insurer’s 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 U.S. Attorney General’s Office to seek an order (an injunction) prohibiting persons from engaging in any illegal conduct.

While the NAIC is committed to state-based 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, the states have had difficulty in turning to federal prosecutors to assist them with certain groups of wrongdoers. However, with these federal criminal and civil statutes in place, coupled with the law enforcement and judicial authority of the United States behind them, the states’ tools in their arsenal to combat insurance fraud activities improve. Federal statutes are viewed as enhancing, not superseding, state law enforcement and 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 the U.S. 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 involved new responsibilities for state insurance regulators, the Federal/State Coordinating Working Group of the Antifraud 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 important, what obligations have been created for commissioners. Specifically, the Guidelines provide advice to a commissioner who is asked by a prohibited individual (i.e., 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. §§ 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. §§ 1033 and 1034.

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

¹ 29 U.S.C § 1111(a) prohibits a person from service or employment:

- (1) As an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative in any capacity of any employee benefit plan.
- (2) As 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.
- (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. § 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. § 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 Sept. 13, 1994. While *the statute is not retroactive in its application*, from that date forward it became illegal for certain individuals — regardless of when their offenses were committed — 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 not only to licensed insurance professionals and others performing similar work on behalf of insurers, but also to everyone acting as an officer, director, employee, or agent of an insurer, and to anyone else authorized to act on their behalf.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. To understand the broad reach of the statute, it should be kept in mind that all employees, regardless of their position, might thereby have access to sensitive and valuable information.

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.

² The term “working” is used to generally describe activities that are defined in more detail in later sections of these Guidelines.

³ See 18 U.S.C. § 1033(f)(1).

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 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, nor does it grant relief from any applicable state law prohibition.* The statutory language for the mechanism underlined below in 18 U.S.C Sections 1033(e) and 1033(f) provides meaningful definitions:

(A) 18 U.S.C. § 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.

(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.

(C) 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).

⁴ *See* 18 U.S.C. § 1033(e)(1)(B).

(B) 18 U.S.C. § 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. §§ 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 18 U.S.C. Section 1033 or 1034.

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 might 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 could 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 and/or federal law to determine its impact.

- (3) “Crime involving dishonesty or a breach of trust” is discussed within in section B6.
- (4) “Willfully” is discussed within in section B6.

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) Relationship to state law.

Many states have laws limiting the ability of certain persons with criminal records to engage in the business of insurance. It is important to keep in mind that these laws operate independently from 18 U.S.C. § 1033 and are not preempted or in any way modified by Section 1033. Often, these laws will differ in significant ways; for example, the state law prohibition might be triggered by a different list of crimes, might last only for a certain number of years, or might apply only to activities requiring a license. Thus, someone might be barred by 18 U.S.C. § 1033 but not by a similar state law, or vice versa.

A written consent granted by an insurance commissioner under the Act merely releases the holder of the consent from his or her status as a “prohibited person” under federal law. Whether the holder of the consent is qualified to engage in the business of insurance then becomes entirely a matter of state law, just as it would have been in the absence of 18 U.S.C. § 1033.

(B) 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 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 on 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

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).

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” vs. “participates in such business.” The rules of statutory construction require that a distinct meaning be found for each of the phrases. The second phrase usually modifies or adds to the first phrase. *Webster’s II, New Riverside 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 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 might have personnel records that contain evidence of past felony convictions relevant to these statutes. Officers and directors might 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 might 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 types of 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 current and prospective employees.

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).

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 indicate 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 ever 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 thirty (30) days of conviction.

Other suggested methods insurers might use to protect themselves would be to conduct criminal checks on individuals who are (or might 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.

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

Numerous questions arise concerning the application of this provision. Which state’s commissioner has primary (or sole) authority to consider a request for written consent pursuant to 18 U.S.C. § 1033(e)(2)? Is it:

- (1) the state where the insurer is domiciled?
- (2) the applicant’s state of residence, and does that depend on whether the applicant’s activities will also simultaneously require the issuance of a resident license?
- (3) the state where the applicant will work, if different from the insurer’s state of domicile?
- (4) the state where the felony conviction occurred?
- (5) any state where the insurer possesses a foreign certificate of authority?

The statute, by its terms, grants this authority to “any insurance regulatory official authorized to regulate the insurer.” Read literally, this would mean 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 might 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 person’s activities affect

numerous states, such as an officer or director of the insurer, or when no specific insurer is involved.

Many regulators, on the other hand, believe that it could not have been the intent of the U.S. 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 multiple jurisdictions. A number of other legal authorities expressed opinions that, regardless of how one would like the law to read, criminal statutes are narrowly construed in favor of defendants.

Regardless of the debate, as a defense to federal prosecution, 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 he or she desires to conduct insurance activities. However, the statutes do not clearly identify who is the appropriate insurance regulatory official (commissioner) to apply to for written consent. If the states can agree among themselves as to who has primary jurisdiction, these disputes can be avoided and the risk of “forum shopping” can be minimized. That is one of the core purposes of these Guidelines.

(D) Methodology to determine the “appropriate insurance regulatory official.”

In determining which commissioner is the “appropriate insurance regulatory official” to consider a request for written consent pursuant to 18 U.S.C. § 1033(e)(2), the following shall be considered in the order indicated:

- (1) If the applicant is applying for a license as a producer or other licensed insurance professional, the state that would be issuing the resident license.
- (2) If the applicant is to become an employee or officer, partner, owner, director or board member of an insurance company, HMO, or any similar regulated insurance entity:
 - (a) Where the applicant’s most substantial work will be performed.
 - (b) The state of domicile of the regulated insurance entity.
- (3) If the individual is a consultant for, or an employee, officer, partner, owner, director or member of a non-licensed entity:
 - (a) The applicant’s state of residence;
 - (b) The focal point of the individual’s business or professional activities.

- (c) The jurisdiction that has the most regulatory interest over the applicant's proposed insurance activities, as reflected in his or her application for consent. All of the following factors should be considered in determining which jurisdiction has the most regulatory interest:
 - (i) Situs of proposed activity;
 - (ii) Percentage of insurance business activity within the jurisdiction;
 - (iii) Monetary value of insurance business activity within the jurisdiction; and
 - (iv) Potential harm to the citizens within the jurisdiction.
- (d) The jurisdiction (s) where the prior criminal activity occurred and the felony conviction was obtained.

If the commissioner receiving an application for 18 U.S.C. § 1033 consent determines that there is a more appropriate insurance regulatory official, then the commissioner should forward the application to the most appropriate NAIC member who satisfies the above criteria. Such an approach would guide the applicant to a state that has substantial ties with the applicant and his or her proposed activities, and discourage applicants from obtaining "stealth" consents in jurisdictions where their contacts are minimal or insubstantial.

- (E) Notice to members of the NAIC and other commissioners by the "appropriate insurance regulatory official" responses.

Upon receipt of an application, a commissioner who has determined that he or she is the "appropriate insurance regulatory official" 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. Further, the "appropriate insurance regulatory official" should make the application for the 18 U.S.C. § 1033 consent available to all other commissioners upon request.

This database or bulletin board should be monitored diligently by all commissioners. It should be the duty of any commissioner who has relevant information regarding the fitness of the applicant to immediately respond to any notice by the "appropriate insurance regulatory official" that a Section 1033 consent has been received by providing the "appropriate insurance regulatory official" with any adverse or relevant information regarding the applicant's fitness to engage in the business of insurance. In this regard, the application should not be acted on by the "appropriate insurance regulatory official" until other NAIC members have had at least ten (10) days from the date notice was sent to comment on the application. If a second commissioner believes that he or she has primary jurisdiction under these Guidelines and objects to the first commissioner's exercise of jurisdiction over the application, the second

commissioner should notify the first commissioner immediately, and the two commissioners should endeavor to reach agreement as to which of them is the “appropriate insurance regulatory official.”

Following a decision whether to grant or deny written consent, the “appropriate insurance regulatory official” should again notify all other NAIC members of the decision by e-mail and place an entry noting the decision into the appropriate NAIC database or bulletin board. Information regarding the granting or denial of written consent will be of great value to state licensing and administrative authorities to stop a prohibited person from returning to the business of insurance through an initial “sweetheart consent” obtained from a targeted state or from a state not privy to complete information about a prohibited individual.

If an “appropriate insurance regulatory official” (as determined by the factors listed above) issues a Section 1033 consent after due process consideration and investigation of the prohibited person’s complete application and after the database/bulletin board comment procedure described above, other commissioners must give full faith and credit to that consent. If the Section 1033 consent is denied, no other commissioner may subsequently entertain any application for consent filed by the same prohibited person without first making an explicit finding, after giving the commissioner who denied the previous application notice and opportunity to object, that the commissioner who denied the previous application is no longer the “appropriate insurance regulatory 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 primary jurisdiction, and only then considering the merits of the application. When this method is followed, it will ensure that the prohibited person will be required to apply to a particular commissioner for written consent and, at the same time, prevent prohibited persons from “forum shopping.”

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

(F) Consideration on the merits.

If the commissioner has primary jurisdiction pursuant to these Guidelines, the following should be considered on a review of the merits:

- (1) Whether the applicant has been fully rehabilitated and no longer poses a risk or threat to insurance consumers or the insurer; and
- (2) Whether the issuance of written consent to the applicant is consistent with the public interest, federal and state law and any applicable court orders.

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.

(G) Burden of proof.

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

(H) 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.

(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) State Due Diligence/Notification to all other NAIC members.

Upon receipt of a 1033 application, the commissioner should conduct a search of the State Producer Licensing Database (SPLD) using the name/SSN/NPN (if applicable) of the applicant to determine if a 1033 waiver has been given by another commissioner, any other state license has been issued, or any regulatory actions taken. If information on the applicant appears, the commissioner should contact the specific states which are identified for any pertinent information the commissioner believes is necessary in his/her review of the 1033 application.

Any commissioner who has relevant information regarding the fitness of an applicant for a 1033 waiver is requested to immediately respond with that adverse information. States should allow other NAIC members at least fifteen (15) days from the date notice was sent to them to comment on the application before making a decision on whether to grant the 1033 waiver request.

Following a decision on whether to grant or deny the 1033 waiver request, the commissioner will notify all other NAIC members of the decision by placing the decision into the NAIC 1033 State Decision Repository. Information regarding the granting or denial of a 1033 waiver request 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 might 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. § 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. § 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, then 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 lifelong listing by date and place of all arrests, convictions for felonies, misdemeanors, or offenses and all imprisonment or jail terms resulting therefrom, 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 with 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 ten (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. § 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 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 received timely notice 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 refer to 18 U.S.C. § 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.”
- Although 18 U.S.C. § 1033 is a federal law, and criminal violations are tried exclusively in the federal courts, there are at least two situations in which state regulators will be called upon to decide whether an individual’s conviction involves “dishonesty or breach of trust.” One is if the regulator believes that a prohibited person is unlawfully engaging in the business of insurance within the state, and takes administrative measures such as a cease and desist order. The other is if there is uncertainty whether or not an applicant for consent is a prohibited person. An erroneous determination may result in an order denying consent in a case where no consent was actually required, or in an order dismissing a consent request for lack of jurisdiction in a case where the applicant was in fact a prohibited person. In the latter case, the commissioner’s ruling, even if it is ultimately overturned by a federal court reviewing the issue *de novo*, should be an important factor to consider in determining whether the prohibited person or his or her employer acted willfully.

The statute does not list or define 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 do not appear at this time to be any court decisions outlining standards for determining which crimes involve dishonesty or breach of trust in the context of either Section 1033 or Section 1034.

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.”

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.⁷

⁷ 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]. Other types of crimes fall near the border, and good arguments can be made on both sides of the issue. Note in particular that the Federal Rules Advisory Committee considered it “unduly broad” to treat bank robbery or bank larceny as crimes of dishonesty, while the *Bartlett* court three years later recognized dishonesty as an inherent element of any theft offense.

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 direct the affairs of a bank honestly. 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 federal statutes.

However, at the state level, the nature and elements of a crime are determined according to the relevant statutes and case law of that particular jurisdiction. When applying federal statutes that make classifications based on criminal history, and the defendant has been convicted of a crime under state law, federal courts look to the

elements of the crime as defined under state law, and compare them to the analogous federal offenses and the criteria in the federal statute.

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 readily applied in all the states. In *State v. Eugene*, 340 N.W. 2d 18 (N.D. Sup. Ct. 1983), a state court conducted a careful analysis of the meaning of a crime of dishonesty or false statement under both federal law and the laws of other states that had addressed the issue. In that case, the court adopted the federal approach in construing North Dakota's version of Rule 609, while recognizing that some of the states construed the term more broadly for purposes of their own versions of the rule.

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 might 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, to the extent that the state follows the approach taken by the federal courts and the majority of the states. If state and federal standards appear to be inconsistent, however, then it becomes necessary to conduct separate analyses for purposes of determining whether the individual is a prohibited person within the meaning of Section 1033, and for purposes of determining whether the individual is disqualified under state law.

Careful attention should be paid to applications for written consent by persons seeking employment in the business of insurance, who, because of the nature of their duties, do not require licensure by the states. The regulator should consider the actual duties of each applicant and the degree of control each person might have over the operations of the insurer. If consent is granted, it should be structured so as to require further review whenever the duties of a person who has been granted written consent change or are substantially 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 might 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 U.S.C. § 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 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” might 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 U.S. Supreme Court has observed that the term “willfully” has numerous meanings and “its construction [is] often...influenced by its context.”⁸ The interpretation of “willfully” turns on [each case’s] own peculiar facts.⁹ “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.¹⁰

The better construction of “willfully” is to require finding a specific intent to violate the law.¹¹ 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.”¹² This legislation does not focus on fraud

⁸ *Weldemar Ratzlaf and Loretta Ratzlaf v. United States*, 114 S.Ct. 655, 659 (1994).

⁹ *Screws v. United States*, 325 U.S. 91, 101 (1945).

¹⁰ *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).

¹¹ *Cheek v. United States*, 498 U.S. 1992, 200 (1991).

¹² H.R. Rep. No. 468, 103rd Cong., 2d Sess. @ 1 (1994).

committed by claimants or beneficiaries of insurance policies. When enacting the Act, Congress erroneously believed that parallels could be drawn between the insurance industry's and the savings and loan industry's financial condition and the degree of criminality occurring within those industries.¹³ 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.

ACKNOWLEDGMENTS

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¹³ "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).

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ATTACHMENTS TO
Guidelines for State Insurance Regulators
to the Violent Crime Control and Law
Enforcement Act of 1994:
18 U.S.C. §§ 1033–1034

National Association of Insurance Commissioners
Antifraud Task Force
Adopted March 1998
Attachments Amended 2010

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 bylaw 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

FDIC STATEMENT OF POLICY

The Federal/State Coordinating Working Group of the NAIC Antifraud Task Force 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. §§ 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 a finding of 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 C

GUIDANCE FOR EVALUATING WHICH FELONIES INVOLVE “DISHONESTY OR BREACH OF TRUST”

18 U.S.C. § 1033 bars any “individual who has been convicted of any criminal felony involving dishonesty or a breach of trust” from the business of insurance, but does not include a definition of “dishonesty” or “breach of trust.” In light of the statute’s silence, the purpose of this attachment is to provide guidance for determining which felonies involve “dishonesty or breach of trust.” Because this is a federal statute, any court deciding whether a particular crime involves “dishonesty or breach of trust” under 18 U.S.C. § 1033 will more than likely look to other equivalent federal statutes. Therefore, those states called upon to decide whether an individual is a prohibited person within the meaning of Section 1033 should apply the same standards. In interpreting a federal law that contains element and language similar to that in 18 U.S.C. § 1033, the FDIC has promulgated a Statement of Policy defining “dishonesty or breach of trust” and providing guidance as to the determination of whether a particular crime involves “dishonesty or breach of trust.” Thus, the definition of a “criminal felony involving dishonesty or breach of trust” under 18 U.S.C. § 1033 should mirror the definitions set forth in the FDIC Statement of Policy.

(A) **Definitions**

We are providing these definitions in an attempt to provide some type of uniformity to states’ considerations and determinations of whether or not a particular crime triggers the prohibition contained in 18 U.S.C. § 1033, and to minimize the risk that state regulators and courts will make determinations inconsistent with the federal courts. It is important to keep in mind that standards under state law might be identical, might merely be similar, or might be completely different. To the extent that they differ, the federal standards will apply to decisions under Section 1033, while the state standards will apply to decisions under state law.

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 Section 1033.

a. **Dishonesty**

The FDIC Statement of Policy defines “dishonest” as “as 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.” 63 *Federal Register* 23, 66177.

Other commonly found definitions for dishonesty are similar to the FDIC’s definition: “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;. See also, Tucker v. Lower, 200 KAN. 1, 434 P. 2d 320.

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

b. Breach of Trust

The FDIC Statement of Policy defines “breach of trust” as “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.” 63 *Federal Register* 23, 66177.

Listed below are several examples of various definitions for the offense of breach of trust that are similar to those in the FDIC’s Statement of Policy: “a trustee’s violation of either the trust terms or the trustee’s general fiduciary obligations; the violation of a duty that equity imposes on a trustee 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, except 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).

(B) Examples of crimes involving “dishonesty or breach of trust”

The most important factor for determining whether a particular crime involves “dishonesty or breach of trust” is whether the statutory elements of the crime involve “dishonesty or breach of trust.” If such elements are involved in the crime, then 18 U.S.C. § 1033 is triggered. Further, 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 that may be qualified offenses for the purposes of 18 U.S.C. § 1033.

1. Any type of fraud, including, but not limited to, insurance fraud, mail fraud, mortgage fraud, Medicare fraud, land fraud, tax fraud, securities fraud, and criminal fraud;
2. Counterfeiting or passing counterfeit money;
3. Bribery and bribe receipt;
4. Any crime involving false pretenses;
5. Money laundering;
6. Extortion;
7. Forgery or any crime involving the falsification of documents;
8. Embezzlement;
9. Criminal impersonation;
10. Fraudulent conveyance of property;
11. Fraudulent use of credit or debit card;

12. Knowingly issuing a bad check;
13. Any crime involving the making or utterance of a false statement;
14. Perjury and subornation of perjury;
15. Knowingly possessing a forged instrument;
16. Knowingly receiving or possessing stolen property;
17. Theft by deception;
18. Witness/evidence tampering; and
19. Crimes of financial exploitation.

There has been concern that serious crimes — including, for example, manslaughter, rape, burglary or robbery, arson, unlawful sexual conduct, child abuse, molestation or other crimes against children, kidnapping and murder — might not contain an element of dishonesty or a breach of trust and, despite their seriousness, might not be a trigger for this prohibition status. The focus of the U.S. Congress when enacting Section 1033 was not on the relative seriousness of different felonies, but on the relevance of the crime to the person’s fitness to participate in the financial industry. If state law bars additional classes of convicted felons from participating in the business of insurance — or if state courts interpret the phrase “dishonesty or breach of trust” in an analogous state statute differently than do federal courts — the state retains the authority to apply its own law. These Guidelines only address questions of federal law; questions of state law must be decided on a state- by-state basis.

OTHER RELATED LEGISLATION

As further guidance, recent pending legislation may be helpful. On Nov. 6, 2001, the U.S. House of Representatives adopted HR 1408: Financial Services Anti-Fraud Network Act. HR 1408 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. HR 1408 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 D

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 Sept. 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's Office 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 Sept. 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 DOI 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 DOI 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 DOI'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 III(A), 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 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 DOI'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 thirty (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, the application 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. § 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 agent licensing and the chief of financial examination. [Membership 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

A. Jurisdiction

The DOI 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.

B. 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. Because 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.

C. 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 "Long 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.

D. Short Application Form

The short application form will be sent to applicants in cases where the DOI is unable to determine whether 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 Section 1033's prohibition is to prevent certain persons from having the opportunity to harm the public or insurers.

E. Long 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 long application form will be sent to the applicant for completion.

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

If a long form is required to be submitted, and the applicant has previously filed a short form with the DOI, any duplicative answers or attachments may be disregarded. Upon receipt of the long form the DOI might 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.

F. 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.

G. Requirement to Provide Documents

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

H. 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 then 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. The Committee 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:

1. 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.
2. 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.
3. 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.

IV. 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.

A. Hearings and Burden of Proof

All hearings conducted by the DOI with regard 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 Section 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.

B. 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 shall 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.

C. 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 Section 1033 written consent e-mail notification list.

D. 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 DOI of the existence of any such felony offenses and shall provide all relevant documents and information.

V. 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 DOI (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 Section 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 DOI 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 Section 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.

B. 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 thirty (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.

C. Failure to File Documents

If the applicant subject to 18 U.S.C. § 1033 and/or the agency or company he/she represents or a licensed agent or corporate official of a licensee fails to file requested documents or information within thirty (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.

D. 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 might 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.

E. 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.

VI. Definitions

[Drafting Note: These definitions could 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. (*See* 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 U.S. 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 E

LONG FORM APPLICATION 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:

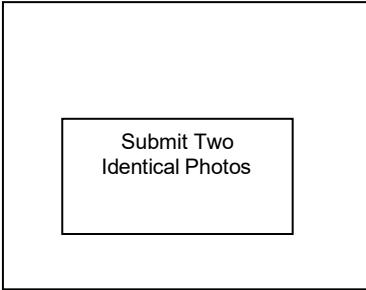
- (e)(1)(A) Any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business,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

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:

9. Have you ever applied for consent from an insurance regulatory authority? Yes No
 If yes, provide details below:

State(s): _____

Granted
 Denied
 Other _____

Please provide details of outcome of prior or pending applications for Consent:

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 Address Dates Attended Designation
 or Programs

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
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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
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SECTION IV – 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 contendere* 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.

2. 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 contendere* 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
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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
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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 affect 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 might 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
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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.**

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 F

SHORT FORM APPLICATION 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 five (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 five (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.

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.

3. Have you ever applied for consent from an insurance regulatory authority? Yes No
If yes, provide details below:

State(s): _____

- Granted
 Denied
 Other _____

Please provide details of outcome of prior or pending applications for Consent:

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.**

I, _____ (name of applicant), swear under penalty of law that my statements in the attached Application, and the documents appended thereto, are true and correct and complete. I understand that my statements in the Application and the attachments to my 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, in making a decision on this 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 criminal or administrative remedies available and that any insurance license(s) 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, for the State of _____ may conduct an independent investigation to confirm the information in this Application and 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:



The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

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