



OFFICE OF THE GENERAL COUNSEL

VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

This memorandum is not intended to provide specific advice about individual legal, business or other questions. It was prepared solely as a guide, and is not a recommendation that a particular course of action be followed. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional should be sought.

Updated as of December 2009

INTRODUCTION

The federal Violent Crime Control and Law Enforcement Act of 1994 (“Act”) was a large crime bill that provided funding for new police officers, new prisons, programs to prevent violence against women, and other social service initiatives. Less well known is that the Act also included insurance fraud provisions that were the result of over five years of Congressional hearings into major insurance company failures in the 1980s. The subcommittee overseeing the hearings concluded that existing state remedies against insurance fraud were ineffective against some conduct that drove failed companies into bankruptcy, and that the federal government’s investigatory and law enforcement resources were needed to prevent a reoccurrence of these types of failures, particularly in the wake of the savings and loan crisis and the large number of bank failures that resulted from inadequate federal oversight. The Act became effective on September 13, 1994, and the provisions relating to insurance fraud are in sections 1033 and 1034 of Title 18 of the U.S. Code. The text of the statute can be accessed by Big “I” members who log in to www.independentagent.com and select Legal Advocacy, under Links.

The Act (in section 1033(e)) makes it illegal for any individual who has been convicted of a criminal felony involving breach of trust or dishonesty to engage in the business of insurance. Under the Act, any person convicted of such a crime can engage in the business of insurance only after receipt of a waiver issued by the authorized state insurance regulator in the state where the individual wishes to engage in the business of insurance.

APPLICATION TO THE BUSINESS OF INSURANCE

The Act defines the business of insurance broadly, and although independent insurance agents are not expressly named, a common sense reading of the law indicates it was intended to apply to them. This is because the Act’s definition of the “business of insurance” covers the actual writing of insurance, the acts “necessary or incidental” to writing insurance, and the acts of “agents, or employees of insurers or who are other persons authorized to act on behalf of such

persons.” It also is because the Act also applies to every individual “who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business.”

In addition, given the Act’s broad definition of the business of insurance, the most prudent approach is to understand the intent of the Act as applying not only to independent agents, but also those only indirectly engaged in the business of insurance, such as individuals who hold management, supervisory, support, or advisory positions within an agency who are involved in insurance activities, like CSRs.

KEY PROHIBITIONS UNDER THE ACT

For independent agents, the most important prohibitions are the provisions that: 1) bar any person convicted of a “criminal felony involving dishonesty or a breach of trust” from engaging in the business of insurance, unless that person first receives a written waiver from the insurance regulatory official authorized to regulate the business of insurance in the state where the business of insurance is being conducted; and 2) make it a crime for anyone to “willfully” permit a person with such a conviction to participate in the business of insurance, unless that person has first received a written waiver from the insurance regulatory official authorized to regulate the business of insurance in the state where the business of insurance is being conducted.

The Act also attempts to reduce specific kinds of fraud by making it a crime to knowingly make false statements concerning an insurance company’s assets to state regulators or make false entries in an insurance company’s books/records with an intent to deceive; embezzle money, premiums, or credits of an insurance company; and obstruct the investigations of state insurance regulators.

PENALTIES FOR ACT VIOLATIONS

There are stiff criminal and civil penalties for violating the Act. Anyone who has been convicted of a criminal felony involving dishonesty or a breach of trust who willfully engages in the business of insurance without an advance waiver from a designated state insurance regulatory official is subject to a fine or imprisonment of up to than 5 years, or both. Anyone who willfully *permits* such a person’s participation in the business of insurance is subject to those same penalties. For violations of the other provisions of the Act, such as knowingly making false statements concerning an insurance company’s assets to state regulators, embezzling, making false entries in an insurance company’s books, and obstructing investigations, prison terms can be as high as 15 years if the violation jeopardizes the safety and soundness of an insurer and was a significant cause of the insurer being placed in conservation, rehabilitation, or liquidation.

The U.S. Attorney General is authorized to bring civil actions and to seek injunctions against those believed to be violating the Act. The civil penalty can be up to \$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 an insurer’s insolvency, the penalties will be collected for the benefit of the policyholders, claimants, and creditors of that insurer.

COMPLIANCE WITH THE ACT

An agency should not be liable for violations of the Act unless it “willfully” permits staff or independent contractors convicted of any felonies involving a breach of trust or dishonesty to engage in the business of insurance. “Willfully” means with either actual or constructive knowledge of the felony conviction.

For prospective employees or independent contractors, an agency can review its existing hiring practices to determine whether job applicants are asked to provide information concerning prior felony convictions involving a breach of trust or dishonesty. If that is not already a part of the hiring process, or considered as job duties/projects are assigned, it can be added to the employment application form and internal processes the agency uses in hiring, promotions and the assignment of work/projects/responsibilities. An agency should not allow anyone convicted of a felony involving a breach of trust or dishonesty to engage in the business of insurance for the agency without first obtaining a written waiver from the appropriate regulators.

For current employees and independent contractors, information about prior convictions may already be requested by and/or provided to an agency in an individual’s employment application or other communication concerning their work for an agency. If such information about a prior felony conviction involving a breach of trust or dishonesty has been provided to the agency in some way, then the agency would likely be deemed to have at least constructive knowledge of the conviction, even if it is not actually aware of the information. This could arise through a range of materials, such as employment application materials, license applications/renewals and communications related to them, notes from interviews, etc. Once an agency has actual knowledge of a felony conviction for a breach of trust or dishonesty, or is in a position to be deemed to have constructive knowledge of such a conviction, a written waiver from the appropriate regulator must be obtained before that person can engage in activities involving the business of insurance, even if the person obtained or renewed an insurance license after disclosing the conviction to the regulators.

For an agency that wants to take other affirmative steps to enhance its efforts to comply with the Act, one approach to consider is to require all staff and independent contractors engaged in the business of insurance to provide a written representation that they have not been convicted of a felony involving a breach of trust or dishonesty and that if they are convicted of such crimes, that they agree they will immediately notify agency management of that. Any signed forms of this type should be retained in the agency files so the forms are accessible in the future in case they are needed, such as for an investigation, litigation, regulatory proceeding, etc. This course of action may support that the agency demonstrated good faith efforts to comply with the Act. A sample form to accomplish this is attached as Appendix A to this memorandum.

Another approach an agency may consider is to conduct background investigations on staff and independent contractors engaging in the business of insurance for the agency. There is no requirement in the Act that this be done, but it is an approach that some may choose. Some downsides of this approach include that such investigations sometimes miss reported convictions, are costly to conduct, do not address convictions that occur after the background check is completed, and may be disturbing to those being subjected to them because such background checks may capture information not relevant to what is prohibited by the Act, may be

conducted in a way that arouses suspicion in colleagues/friends and others in the community, and may create unique challenges due to identity confusion for people with similar or common names.

An agency cannot avoid compliance with the Act by choosing not to ask staff or independent contractors if they have been convicted of any felonies involving a breach of trust or dishonesty. In other words, “don’t ask, don’t tell” is not an effective approach to compliance with the Act by an agency. An agency’s willful failure to determine whether its staff or independent contractors have been convicted of any felonies that disqualify them from engaging in the business of insurance may be treated as evidence that the agency was “willfully” allowing someone disqualified from engaging in the business of insurance to conduct such activities for the agency, and prevents an advance written waiver from being obtained to allow for such activities as it would not be known that it was needed.

If a carrier asks the agency to allow the carrier to conduct background checks/criminal background checks on the agency staff, the agency should review the request carefully. IIABA is not aware of any legal reason a carrier needs to conduct such background checks on the agency staff or independent contractors. If the carrier indicates that such investigations are required by law, the agency can ask the carrier to provide the agency with copies of applicable laws, which the agency can share with the individuals being asked to agree to the investigations. It is possible that the carrier may have developed an approach to its Act compliance procedures that goes beyond what is required by the Act. If such a request is made, the agency should note that it is unlikely that it has authority to give permission to the carrier to conduct background checks on the agency staff or independent contractors – the individuals about whom such investigations would be conducted have the right to agree to or reject such requests. Those individuals may have legitimate concerns about such investigations for the reasons noted above in this section about the factors that may cause an agency to decide not to conduct such investigations. If they do agree to such requests, it is important that they carefully read any document authorizing such investigations to be sure that all terms are acceptable, and if they are not, desired changes should be requested.

ROLE OF STATE LAWS

Agencies should be knowledgeable about the laws/regulations in jurisdictions in which they conduct the business of insurance to assure compliance with all applicable requirements, including any that apply to individuals engaged in the business of insurance who have been convicted of crimes. Even if the jurisdictions in which they conduct business have no laws/regulations on this at a given time, it does not mean that there will not be any in the future, so it is prudent to check if the agency has already or wants to hire or retain anyone to conduct the business of insurance who has been convicted of a felony involving a breach of trust or dishonesty. Also, regulators may have specific procedures to handle requests for the waivers needed to allow people convicted of any felonies involving a breach of trust or dishonesty to engage in the business of insurance, so it is important to determine if that is the case and to follow them if such waivers are needed.

Appendix A

Note: This sample form may not work for all agencies or in all circumstances. This form should be reviewed carefully before using and modified as appropriate to the circumstances.

Sample Statement Regarding the Violent Crime Control and Law Enforcement Act of 1994

I represent and warrant to _____ (“Employer”) that I have never been convicted of a criminal felony involving breach of trust or dishonesty. If I am convicted of such a felony, I immediately will advise the Human Resources Director of Employer of such conviction in writing. I further represent and warrant to Employer that my participation in the business of insurance through my work on behalf of Employer and/or any of its subsidiaries/affiliates does not and will not violate the Violent Crime Control and Law Enforcement Act of 1994, as it may be amended, and as it may be interpreted by the insurance departments of any state in which I have a license to participate in the business of insurance or by other regulators with jurisdiction.

I understand that if I provide inaccurate information about myself to Employer and/or any of its subsidiaries/affiliates regarding this or any other information, it will be grounds for immediate disciplinary action, up to and including termination.

Print Name

Signature

Date