



white paper

# WRITTEN CONSENT REQUIREMENTS

Under 18 U.S.C. 1033

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## WRITTEN CONSENT REQUIREMENTS UNDER 18 U.S.C. 1033

On September 13, 1994, President Bill Clinton signed the omnibus anticrime bill titled the Violent Crime Control and Law Enforcement Act of 1994<sup>1</sup> (the “Act”). The Act included new federal criminal and civil enforcement provisions aimed directly at white-collar and other insurance fraud. Specifically, the Act included 18 U.S.C. §1033(e), which prohibits individuals who have been convicted of a felony crime involving dishonesty or breach of trust from working in the insurance industry unless they obtain written consent from their state insurance commissioner.

The criminal enforcement of §1033(e) is the responsibility of the federal government. However, state insurance commissioners and agencies continue to have authority to regulate the insurance industry

in their states, including overseeing §1033(e) waiver requests and determining whether or not to grant such waivers. It is important to keep in mind that the Act does not preempt or supersede applicable state laws, so an individual who has been granted relief from the Act or whose criminal record does not trigger the Act in the first place may still be barred from the insurance industry by state law.<sup>2</sup>

<sup>1</sup> Public Law 103-322, H.R. 3355.

<sup>2</sup> 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 1* (2011).



## I. SEC. 1033(E)'S BAN ON INDIVIDUALS CONVICTED OF CERTAIN FELONY CRIMES

Sec. 1033(e) prohibits individuals convicted of certain felony crimes involving dishonesty or breach of trust from engaging in the business of insurance. This section also goes a step further by making it unlawful for any person to willfully permit an individual with such a felony conviction to engage in the business of insurance.

Specifically, 18 U.S.C. §1033(e) states:

(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 for 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.

### **1. Individuals Convicted of Felony Crimes Involving Dishonesty or a Breach of Trust Cannot Engage in the Business of Insurance (Unless Given Written Consent)**

Sec. 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 unless they are given written consent.<sup>3</sup>

## 2. Prohibited Individuals May Obtain Relief

Sec. 1033(e)(B)(2) provides a mechanism whereby a prohibited individual may apply to the appropriate insurance commissioner for “written consent” to work in the business of insurance. Once the appropriate insurance regulatory official reviews the prohibited individual’s initial application and supporting affidavit, the commissioner may issue written consent for that person to engage in the business of insurance or participate in such business. This consent should specifically refer to 18 U.S.C. § 1033(e)(2) and should also state that it is conditioned upon the truth and veracity of facts disclosed by the applicant in his or her application. Any other restrictions on the consent will likely be expressly noted as a condition of the receipt of the written consent.<sup>4</sup>

Based on the language of the statute, a prohibited individual cannot work in the business of insurance while that person is applying for written consent—the individual can only begin working when the written consent is granted.<sup>5</sup> If an appropriate insurance regulatory official grants written consent after due process consideration and investigation of the prohibited individual’s complete application, other commissioners must give full faith and credit to that consent.<sup>6</sup>

## 3. Responsibilities of Insurers and Others to Identify Prohibited Persons

“Sec. 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 Sec. 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.”<sup>7</sup>

Thus, “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. 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.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 18.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.* at 14.

“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. It should be noted 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.

“If a determination is made that a person has been convicted of a felony crime of dishonesty or breach of trust, and that person wants to engage, or is engaged, in the business of insurance, that person must refrain from conducting any insurance activities until such time as he or she has obtained ‘written consent’ from the appropriate commissioner (as described above). 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.”<sup>8</sup>



## II. 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 Sec. 1033. 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.<sup>9</sup> Often, these state laws will differ in significant ways. For example, the state law prohibition might be triggered by a different list of crimes, might only last 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.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 8.