STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE
OFFICE OF LEGAL COUNSEL
500 JAMES ROBERTSON PARKWAY
DAVY CROCKETT TOWER
NASHVILLE, TENNESSEE 37243
TELEPHONE: (615) 532-6830 FAX: (615) 741-4000

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Ed Lancaster, General Counsel
Tennessee Farmers Insurance Companies
Attn: Karen B. Blevins
P.O. Box 998
Columbia, Tennessee 38401-0998
(931) 388-7872
elancaster@tfbf.com

Re: **Interpretive Opinion 08-15, Insurer Obligations as an Employer Regarding Employees' Felony Convictions and 1033 Waivers**

Dear Mr. Lancaster,

The Insurance Division of the Tennessee Department of Commerce and Insurance ("Division") is in receipt of the request for an interpretive opinion requesting guidance as to an insurer's obligation as an employer to ensure employee compliance with Tenn. Code Ann. § 56-53-106 and 18 U.S.C. § 1033 when employees have felony convictions involving dishonesty or breach of trust.

Specifically, you asked the following questions:

1. What process must individuals with felony convictions in their backgrounds follow to seek a waiver from the Commissioner for employment in the business of insurance?
2. If an employer has no knowledge to the contrary, may the employer rely on potential employees' representations that they have not been convicted of any felonies which may preclude them from working in the business of insurance?
3. Is a pre-employment criminal background check required for non-licensed positions which may have access to insurance information, but will not handle funds, in order to avoid knowingly or intentionally permitting an individual with a felony conviction to participate in the business of insurance?
4. If a current employee who may have access to insurance information has a felony conviction, and the employer becomes aware of the felony conviction, what is the appropriate course of action for the employer to take?
5. If a waiver is not granted, is the employer required to terminate the employee?

The facts as understood by the Division are as follows: you seek guidance regarding the appropriate procedures for handling employees with felony convictions in order to implement a practice which will ensure your insurance company, as an employer, exercises the due diligence required to comply with applicable state and federal law. As you have not provided the Division an exact procedure for handling this issue, the Division cannot provide guidance as to specific procedure sufficiency.

The Insurance Fraud Chapter of the Tennessee Insurance Law, codified in Tenn. Code Ann. §§ 56-53-101 *et seq.*, took effect on July 1, 2001, and designated criminal, civil, and administrative liability for individuals found to have committed insurance fraud. Specifically relevant to your inquiries, Tennessee Insurance Law prohibits individuals convicted of felonies involving dishonesty or breach of trust ("prohibited individuals") from participating in the business of insurance absent a waiver granted by the Commissioner of the Tennessee Department of Commerce and Insurance ("Commissioner"). Tenn. Code Ann. § 56-53-106(b)(1) (2001). Furthermore, individuals in the business of insurance shall not allow such prohibited individuals to participate in the insurance business without a waiver by the Commissioner. § 56-53-106(b)(2).

Prior to the enactment of the Tennessee Insurance Fraud Chapter, applicable federal law placed similar restrictions on prohibited individuals. 18 U.S.C. § 1033, enacted in 1994, imposed criminal liability for such violations and delegated the authority to grant written waivers[1] to the states and their appropriate insurance regulators. Consequently, considering Tenn. Code Ann. § 56-53-106(b) and 18 U.S.C. § 1033, individual and company conduct within the business of insurance in Tennessee is likely subject to overlapping state and federal jurisdiction. Your inquiries captioned above will be answered as to the enforcement and application of the Tennessee Insurance Fraud Chapter, specifically Tenn. Code Ann. § 56-53-106, while also recognizing that overlapping federal law may provide some guidance as to the correct interpretation.

Each of your enumerated questions above invoke similar inquiries regarding understanding the correct application of Tenn. Code Ann. § 56-53-106 and obligations imposed on employers thereunder. In essence, within the scope of Tenn. Code Ann. § 56-53-106, these questions probe: 1) how to apply for a 1033 waiver by the Commissioner; 2) what employee activities constitute the "business of insurance"; and 3) when is an individual[2] "knowingly" permitting a prohibited individual to participate in the business of insurance.

Process for Submission of Request for Waiver Pursuant to Tenn. Code Ann. § 56-53-106

In response to question one (1), an application for a 1033 waiver, which also constitutes a waiver in compliance with Tenn. Code Ann. § 56-53-106(b)(1), can be found on the Division's website. An individual seeking a 1033 waiver must fill out the application and submit it to the Division's Agent Licensing Section, with all supporting documentation attached. Upon receipt, the Division

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[1] Waivers granted by state insurance regulators under 18 U.S.C. § 1033 are commonly referred to as "1033 Waivers", and are referenced as such by the Tennessee Department of Commerce and Insurance.

[2] For the purposes of this interpretive opinion, an individual will typically contemplate an insurer acting as an employer.

will review the application and the Commissioner will make a determination and send the applicant a letter stating the decision and reasoning.

What is Considered the "Business of Insurance"

Currently, there is no Tennessee case law or statutory authority providing further interpretation of the term "business of insurance" as used in Tenn. Code Ann. § 56-53-106. The plain meaning of the term is not clear on its face, and, as such, it is necessary to look outside the statute to ascertain the intended meaning of the term. Tennessee courts guide that a term's plain meaning must be considered and "[i]t is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources." *Lind v. Beaman Dodge, Inc.*, 356 S.W. 3d 889, 895 (Tenn. 2011) (citing *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W. 2d 677, 679 (Tenn. 1998)). Here, in the absence of a clear, plain meaning, consideration of the broader statutory scheme, the legislative intent, and other outside sources, such as comparable federal law and applicable industry guidance, is appropriate and necessary to determine the meaning of the term "business of insurance."

First and foremost, the Tennessee Insurance Law broadly defines the "business of insurance" as:

> Any of the following acts in this state, effected by mail or otherwise by an unauthorized insurer, are included among those deemed to constitute transacting insurance business in this state:
>
> (1) The issuance or delivery of contracts of insurance to residents of this state;
> (2) The solicitation of applications for contracts of insurance;
> (3) The collection of premiums, membership fees, assessments or other considerations for contracts of insurance;
> ***(4) The transaction of matters subsequent to the execution of contracts of insurance arising out of them.***

Tenn. Code Ann. § 56-2-107 (1968) (emphasis added). The Tenn. Code Ann. § 56-2-107 definition of "business of insurance" is drafted broadly to include the majority of business activities in which an insurance company employee may be engaged. Particularly, Tenn. Code Ann. § 56-2-107(4) contemplates any and all transactions of matters arising out of the execution of an insurance contract. This definition is construed expansively so as to include nearly all business duties of an insurer and its employees. Such a broad construction in the greater Tennessee Insurance Law suggests an equally inclusive interpretation of the term "business of insurance" apply under Tenn. Code Ann. § 56-53-106.

Tennessee courts direct that "[w]hen dealing with statutory interpretation . . . . [the] primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope." *Lind*, 356 S.W. 3d at 895 (citing *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W. 3d 676, 678 (Tenn. 2002)). The introductory language of the bill which created Tenn. Code Ann. § 56-53-101 *et seq.* asserts, as rationale for the law's enactment, that to combat pervasive insurance fraud occurring within Tennessee, the legislature believes the problem must be aggressively confronted by, among other things, "reducing the occurrence through stricter

enforcement and deterrence[.]" 2001 Tenn. Pub. Acts, c. 356. The legislature's expressed intent for stricter enforcement and deterrence necessitates a broader, more inclusive interpretation of the term "business of insurance" so as to apply to and encompass as many individuals in the insurance industry as necessary. Considering this clear legislative intent, coupled with the Tenn. Code Ann. § 56-2-107 definition, it appears that "business of insurance" under Tenn. Code Ann. § 56-53-106 must be construed to include most, if not all, matters subsequent or ancillary to the execution of contracts of insurance; essentially nearly all business duties of an insurer.

Further contemplating a broad interpretation of the "business of insurance" term, Tenn. Code Ann. § 56-53-106(b)'s federal counterpart offers a definition for the same term. The related federal statute defines "business of insurance" as the writing of insurance or reinsuring of risks "by an insurer, including all acts necessary or ***incidental*** to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or ***employees of insurers*** or who are other persons authorized to act on behalf of such persons[.]" 18 U.S.C. § 1033 (1994) (emphasis added). On its face, the federal statute regulating who may or may not engage in the business of insurance defines the "business of insurance" expansively.

Lastly, while not binding, the National Association of Insurance Commissioners ("NAIC"), a significant participant in the enactment of the federal law, published guidelines to be used in the enforcement of the federal statute, most recently amended in 2010.[3] The NAIC offered these non-binding guidelines to be used, if states wished to apply them, for the purpose of promoting a uniform application amongst the states. In speaking to the correct interpretation of the term "business of insurance," the NAIC guidelines provide that the broad inclusion of officers, directors, agents, or employees in the definition places no restrictions on potential individuals as to whom this law may apply. NAIC, *Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994*, pg 4 (3rd Amended 2010). In addition, the NAIC guidelines note that "other person," as included in the definition, would include application of the law to subcontractors, third-party administrators, consultants, professionals, and the like. *Id.* Most importantly, the NAIC comments that when applying the statute it should be taken into account that ***all employees***, regardless of their position, have access to sensitive and valuable information. *Id.*

In conclusion, considering the similar language and intent Tenn. Code Ann. § 56-53-106 shares with federal law 18 U.S.C. § 1033, the existing interpretations on federal law provide persuasive guidance as to the correct application of the "business of insurance" term in the state law. Coupled with the broad language and legislative intent of Tenn. Code Ann. § 56-53-106, as well as the definition provided in Tenn. Code Ann. § 56-2-107, it is opined that the 1033 waiver requirement at issue here applies to most, if not all, employees of an insurer, as a vast majority of employment positions qualify as participating in the "business of insurance." This law applies to employees that are both non-licensed and licensed insurance producers, as the "business of insurance" is much broader than the sale, solicitation and negotiation of insurance that requires an insurance producer license. However, for enforcement purposes, each matter involving a potential violation of Tenn. Code Ann. § 56-53-106 shall be considered on a case-by-case basis.

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[3] NAIC Antifraud Task Force, *Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994*, National Association of Insurance Commissioners (2010), http://www.naic.org/documents/prod_serv_legal_sir_op.pdf.

What is Knowledge Pursuant to Tenn. Code Ann. § 56-53-106

The final general issue arising from your inquiries questions when an insurer is considered to have "knowingly" permitted a prohibited individual to participate in the "business of insurance." Tenn. Code Ann. § 56-53-106 does not define the term "knowingly" and, therefore, the correct interpretation of the term must be determined by applying either the plain meaning of the term or the legislative intent in enacting the law. Black's Law Dictionary[4] defines "knowledge" as "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." Black's Law Dictionary (9th ed. 2009).

An insurer's failure to implement any procedure that attempts to ensure employees either are not prohibited individuals, or, if prohibited, they have obtained a 1033 waiver from the Commissioner, increases the risk for liability under Tenn. Code Ann. § 56-53-106(b)(2). Applied to the issue at hand, an insurer's failure to implement any form of employee screening renders an insurer, as an employer, substantially unable to know whether employees are prohibited individuals lacking a 1033 waiver from the Commissioner or otherwise. In other words, absent some detection procedure, an insurer is unable to certify any lack of substantial doubt, or knowledge, as to the status of an employee as a prohibited individual. Again, such enforcement actions related to measures taken by an insurer must, however, be determined on a case-by-case basis.

The Division lacks the authority to require insurers to implement specific prospective screening procedures. Nevertheless, to ensure compliance and avoid a violation of Tenn. Code Ann. § 56-53-106, the Division encourages implementation of such a screening process. The NAIC, in offering a non-binding interpretation of the federal counterpart 18 U.S.C. § 1033, opines that insurers should take steps to identify prohibited individuals on a prospective basis. *Guidelines for State Insurance Regulators* at pg. 8. The NAIC guidelines suggest insurers require a written certification from current and prospective employees, attesting to their criminal history, both state and federal.[5] *Id.* Another suggested method by the NAIC includes the use of criminal background checks on individuals, especially those entrusted with duties that could pose a risk to the safety and financial soundness of an insurer. *Id.* at pg. 10.

Conclusion

The above interpretations should serve to offer guidance of the measures necessary to comply with Tenn. Code Ann. § 56-53-106. Again, each matter arising as a potential violation of Tenn. Code Ann. § 56-53-106 will be handled and interpreted on a case-by-case basis and, therefore, a determination of the specific employee positions and screening procedures an insurer must implement is not feasible. Nonetheless, the statutory language should be recognized for its broad and inclusive nature. While the Division cannot prospectively resolve as to whether a

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[4] The Tennessee Supreme Court has held that Black's Law Dictionary is a legitimate authoritative source and may be referenced when the legislature does not provide a specific definition for a statutory term. Carter v. Bell, 279 S.W.3d 560, 570 (Tenn. 2009).

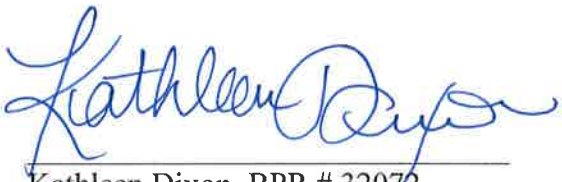
[5] This certification is not limited to felonies involving dishonesty or breach of trust, but additionally contemplates any felony for which an employee or potential employee has been convicted. *Guidelines for State Insurance Regulators* at pg. 8.

background check or an inquiry to all employees of their criminal history is necessary, it is clear that such precautionary measures are beneficial in avoiding violations regarding an insurer knowingly permitting prohibited individuals to participate in the business of insurance.

Please note that the Division has not made an independent investigation of the facts to determine the accuracy or completeness of the information supplied, but has instead relied solely upon the information you have provided. If such information is incorrect or changes substantially, it would be necessary for the Division to reconsider the matter and the position stated herein would be void. This letter expresses the Division's position on enforcement action only and does not purport to express legal conclusions on the issues presented. This position is furnished solely for the benefit and use of the entities described herein. Please be advised that further publication or use of this position may only be made with the Division's prior written consent.

This response by the Division is to a specific fact situation relating to felony convictions and 1033 waivers pursuant to Tenn. Code Ann. § 56-53-106 of the Insurance Fraud Act and should not be construed as a legal position or opinion of the Commissioner of the Tennessee Department of Commerce and Insurance or of any other official in the Department. Please note that the conclusions contained herein are based upon the representations that have been made to the Division, and any different facts or conditions might require a different response. As each inquiry is reviewed on the specific facts presented, this response is based only on such facts and may not be used as precedent by any person or entity. Any variation in the facts presented to the Division by Mr. Ed Lancaster could result in a different conclusion than asserted herein.

If you have further questions or concerns regarding this letter, please feel free to contact me.



Kathleen Dixon, BPR # 32072
Assistant General Counsel
Department of Commerce and Insurance
Davy Crockett Tower
500 James Robertson Parkway
Nashville, TN 37243
615-532-6830
kathleen.dixon@tn.gov