# INDEPENDENT INSURANCE AGENTS OF LOUISIANA
## 9818 BLUEBONNET BOULEVARD
## BATON ROUGE, LA 70810
## TEL: 225/819-8007
## FAX: 225/819-8027
## www.iial.com


**TA 210** **Date July 22, 2002**

**SUBJECT: Federal Law Targets Felons in Insurance – and Their Employers**

**BACKGROUND:**
Insurance fraud in the United States is estimated to run between $80 billion (*Coalition Against Insurance Fraud*) and $100 billion annually (*National Association of Insurance Commissioners – NAIC*). That costs Americans over $1,000 per household each year.

Insurance fraud covers a broad spectrum – Auto, Homeowners, Worker's Compensation, Health, Life, as well as a wide range of "insider fraud" – committed by people working in insurance.

According to a March, 2002, report of the NAIC's Antifraud Task Force, there have been over forty insurance company insolvencies due to alleged fraud since 1969. In addition, the report estimates that the average cost of insurance insider fraud is $72,000 per incident.

As a result of a spate of insurance company failures in the 1980's, which followed on the heels of the massive Savings and Loan problems, Congress began lengthy investigations and hearings. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act (VCCLEA) (Public Law 103-322), which included a provision aimed at felons working in insurance, as well as their employers (Title 18 U. S. Code, Sections 1033 and 1034). Penalties for both the employed felon working in insurance, as well as the insurance agency or company employing them, are substantial – both in heavy fines, as well as up to five years in prison.

**MAIN POINTS:**
While the insurance industry generally supported passage of the VCCLEA's insurance fraud provisions, the impact and ramifications on the industry have generated both surprise and confusion.

***Overview of the VCCLEA.***
Most authorities on the subject, familiar with the tone and scope of the original investigations and hearings held by Congress, felt the primary focus of the legislation was "insider fraud" – that is, insurance fraud perpetrated by people inside the industry. Some have opined that the law was originally aimed only at insurers. However, most

legal experts (including those at the NAIC, as well as the Independent Insurance Agents and Brokers of America – IIABA) have since concluded that the law probably applies to everyone in "*business of insurance*" – insurers, reinsurers, agencies, and most anyone who "*engages in*" or "*participates in*" the industry, including "*all acts necessary or incidental to*" insurance, such as officers & directors, consultants, subcontractors, third party administrators, related professionals, etc. (*See 18 U.S.C. 1033(e)(1)(A),1033 (e)(1)(B), and 1033(f)(1).)*

In a nutshell, the VCCLEA has two main provisions:
(1) "*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."* [*18 U.S.C. 1033(e)(1)(A)*]. (Note: the fines can be up to $50,000 per violation, as provided in *18 U.S.C. 1034.*)

(2) "*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." (18 U.S.C. 1033(e)(1)(B).)* (Note: the fines can be up to $50,000 per violation, as provided in *18 U.S.C. 1034.*)

Thus, it is a violation of the VCCLEA for any person to engage in or participate in insurance who has been convicted of a felony involving dishonesty or breach of trust, and it is also a violation for any employer to willfully permit the participation of such a person in the business of insurance.

***Dishonesty or breach of trust.***
Another equally perplexing provision of the VCCLEA involves the true intent of "*convicted of any criminal felony involving dishonesty or a breach of trust."*

For starters, the law does not provide a definition of, or offer any guidance regarding the scope of, a felony involving "dishonesty" or "breach of trust." Numerous articles have been written since the passage of the law, attempting to establish reasonable boundaries for the terms.

In April 2002, the NAIC prepared a suggested guide on the terms, as an attachment (called "Attachment F") to their "Guidelines for State Insurance Regulators to the Violent Crime Control Act." (www.naic.org). (Curiously, the list includes such things as car jacking, kidnapping, and sexual abuse, which do not usually spring to mind as crimes of dishonesty of breach of trust.)

Another complication is the use of the term "felony," with no elaboration or qualification. Unanswered are situations in which a person was pardoned, the record was expunged, etc. In addition, arrests, pending cases not brought to trial, acquittals, or convictions reversed on appeal apparently do not fall within the "convicted of a felony" language in the VCCLEA. Note also that the law only applies to felony convictions, not misdemeanor convictions.

Legal researchers have also pointed out that the law makes no reference to other crimes, many that are much more serious than dishonesty and breach of trust. Certainly, each state insurance department has questions on its producer licensing application about past criminal activity, and persons with a history of criminal wrongdoing would most likely be barred from holding an insurance license. And, of course, people who are not licensed are not subject to the same scrutiny under state licensing laws. But the apparent scope of the Federal VCCLEA is aimed at just dishonesty and breach of trust, and applies to everyone, licensed or not.

Lastly, there is an unpredictable element in all this due to the variance in each state's laws over such legal issues. Statutory law or jurisprudence in each state could conceivably reach different conclusions about what constitutes a "felony conviction for dishonesty or breach of trust." Not only does this create inconsistency among the various states, but multi-state licensing of producers, for example, highlights this lack of uniformity, an issue currently being addressed nationally, as discussed below.

***Waivers under the law.***
Persons who have had a felony conviction for dishonesty or breach of trust are not permanently barred from insurance. The VCCLEA includes a provision that allows such persons to receive written waivers from their state's insurance regulator [*18 U.S.C. 1033(e)(2)*].

The law makes no specific requirements as to the procedure or considerations each state insurance regulator should or must use in order to grant a written waiver. The NAIC developed a model application which could be used by state regulators. It is available at the NAIC website (www.naic.org), as well as on numerous websites of state insurance departments.

Without question, the safest course of action for anyone with a potential issue involving past criminal history is to contact their state's insurance department.

***New developments and issues.***
Given the current groundswell (some would say avalanche) of interest and activity toward financial services modernization and streamlining, capped most recently by passage of the Gramm-Leach-Bliley Act (GLBA) in 1999, there will be continued efforts at standardizing licensing, and related issues, including increased background checks, and so forth.

In fact, numerous articles on the NAIC website, and similar sites, point to a broad range of options being explored. These include allowing state insurance departments access to the FBI's National Crime Information Center (NCIC) database, as well as the FBI's Fingerprint Identification Records System (FIRS). In May 2001, the NAIC demonstrated a prototype of a new electronic system for fingerprint background checks, called

LiveScan Electronic Fingerprint Technology. Created by Lockheed Martin and Integrated Biometric Technology, LiveScan would reduce the turn-around time for fingerprint analysis from several months to a few days. Formal usage still awaits approval from Congress to gain access to the FBI's FIRS database.

Other issues that will see additional scrutiny in the movement to financial services modernization include the crazy-quilt variations in state licensing laws. In the case of written waivers permitted under VCCLEA, a person with a felony conviction for dishonesty or breach of trust who obtains a waiver in one state currently faces the prospect of obtaining waivers in other states in which he or she wishes to be licensed. Some states favor the reciprocity approach, while others insist on each state's right to maintain their own procedures.

***Recommendations.***
The combined advice from sources such as the NAIC and the IIABA offer several guidelines.

1. Be sure all managers understand the requirements of the VCCLEA.
2. Be sure all employees understand the VCCLEA, as well.
3. Establish a written procedure to canvass all persons subject to the VCCLEA, to determine if anyone has any potential need for a waiver from the state insurance department.
4. The Louisiana Department of Insurance (LDI) agent license renewal application asks several background questions which have been designed to determine if the applicant has any VCCLEA violations. The agency may find these LDI questions useful in determining if current or future employees have any VCCLEA issues.
5. If you have a potential VCCLEA issue, contact the Louisiana Department of Insurance, both to learn what VCCLEA procedures are in place, and to consult or report possible problem cases.
6. Use extreme caution in performing any sort of background check on current or prospective employees. Consult legal counsel before launching off into a unilateral effort to investigate anyone.
7. Also use extreme caution, and consult counsel, before engaging a third party to conduct background checks on employees. Avoid signing broadly worded authorizations that permit the checks, and have counsel review the scope of usage, and hold harmless provisions, of such a written agreement.

**NECESSARY ACTION:**
Circulate this Technical Advisory to all management staff, and perhaps all employees.