

ATTACHMENT F

GUIDANCE FOR THE DETERMINATION OF WHAT TYPE OF CRIMINAL FELONIES INVOLVE FURTHER DESCRIPTIONS AND EXAMPLES OF “DISHONESTY OR BREACH OF TRUST”

~~In addition to Attachment E, and in light of the fact that~~ 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 for of “dishonesty” or “breach of trust.” ~~In light of the statute’s silence,~~ the purpose of this attachment is to ~~supply~~ provide guidance for determining ~~what~~ which felonies involve “dishonesty or breach of trust.” ~~further definitions of these terms and also provide examples of offenses that might fall under these definitions.~~ Because this is a federal statute, any court ~~addressing~~ 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, states called upon to decide whether an individual is a prohibited person within the meaning of Section 1033 should apply the same standards.~~ As mentioned in Attachment E, 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 ~~and examples~~ in an attempt to provide some type of uniformity to ~~state’s~~ states’ considerations and determinations of whether or not a particular ~~state or federal~~ 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 note that the list of examples is a list of crimes provided by the various states. While these state crimes may have federal equivalents, the list contains state crimes which the working group felt involved dishonesty or breach of trust.~~

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. ~~Even though crimes may be similar in name, their elements may vary from state to state.~~

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 Listed below are some 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;”. ~~Also-See also,see~~ Tucker v. Lower, 200 KAN. 1, 434 P. 2^d 320.

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

b. Breach of Trust

The FDIC Statement -of PolicyPolicy 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, accept 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 which 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. ArsonCounterfeiting or passing counterfeit money;
- ~~2.3.~~ Bribery and bribe receipt;
4. Any crime involving false pretenses;
- ~~3.~~ Bribe receipt
4. Burglary
5. Car Jacking
6. Conspiracy
7. Crimes Against Children
- ~~8.5.~~ Criminal ImpersonationMoney laundering;
6. Extortion;
7. Forgery or any crime involving the falsification of documents;
8. Embezzlement;
9. Criminal impersonation;Criminal Solicitation
10. General Fraud
11. Extortion
- ~~12.9.~~ Forgery
- ~~13.10.~~ Fraudulent cConveyance of Pproperty;
14. 11. Fraudulent uUse of cCredit or dDebit cCard;
15. Knowingly Insurance Fraud
- ~~16.12.~~ Issuing a Bbad cCheck;
17. Any crime involving the making or utterance of a false statementKidnapping
18. 13. Making False Statements to Obtain Workers Compensation Benefits
19. 14. Perjury and subornation of Pperjury;
20. 15. Knowingly possessing Possession of a fForged iInstrument;
21. 16. Knowingly Rreceiving or possessing sStolen pProperty;
22. Robbery
23. Sale or Distribution of a Controlled Substance
24. Sexual Abuse
- ~~25.17.~~ Theft by dDeception; and
26. Theft of Property
27. Theft of Services
28. 18. Witness/eEvidence tTampering and.
19. Crimes of financial exploitation.

There has been concern that serious crimes including ~~many crimes of violence~~ such as; manslaughter, rape, ~~burglary or robbery, arson,~~ unlawful sexual conduct, ~~child abuse, molestation or other crimes against children, kidnap,~~ and murder, may not contain an element of dishonesty or a breach of trust and despite their seriousness may not be a trigger for this prohibition status. The focus of 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, and questions of state law must be decided on a state-by-state basis.

~~Despite the fact they may not contain dishonesty or a breach of trust, they may well be statutory disqualifiers under your state licensing laws.~~

