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Re: **Interpretive Opinion 09-15, Immigration Bond Producer Licensure Requirements**

Dear Mr. Taylor,

The Division of Insurance (“Division”) of the Tennessee Department of Commerce and Insurance is in receipt of your request for an interpretive opinion submitted on or about September 23, 2015, to Kimberly Biggs, Director of the Agent Licensing Section. Your inquiry requested guidance regarding sale, solicitation, and negotiation of immigration bonds in the State of Tennessee.

Specifically, you posed two questions to the Division. You asked first what type producer licensure, if any, does the Division require for an individual to sell, solicit or negotiate immigration bonds in the State of Tennessee. You additionally asked whether an individual selling immigration bonds may pay referral fees to or share commissions with unlicensed individuals for referral of immigration bond business, which ultimately results in a sale of such an immigration bond and payment of a commission thereby.

I. Licensure Requirements for the Sale of Immigration Bonds

A professional bondsman is an individual¹ who, for profit, engages in the business of assuming and securing the appearance of individuals charged with a criminal violation, the payment of imposed fines, judgments, damages, and assessed costs through “furnishing bail, making bonds or entering into undertakings, as surety, in criminal proceedings” before any of the courts of the State of Tennessee. Tenn. Code Ann. § 40-11-301(4)(A) (2003). Licensure requirements for professional bondsmen pursuant to Tennessee Insurance Law are different from typical insurance

¹ A professional bondsman can be a person, firm, partnership, or corporation. Tenn. Code Ann. § 40-11-301 (2003). Furthermore, designation as a professional bondsman extends to individuals, such as agents, representatives, or employees, acting, regardless of compensation, for a professional bondsman. *Id.*

licensure mandates. In fact, licensure of professional bondsmen is typically ascribed and regulated by the court in which the professional bondsman seeks to issue bonds. *See* § 40-11-302(c). As such, each court is responsible for establishing its own qualification criteria and regulations. Furthermore, Tennessee criminal procedure statutes exempt, albeit with notable exceptions, professional bondsmen from licensure by the Division entirely. Tenn. Code Ann. § 40-11-302(b) (2015).

Despite the Tenn. Code Ann. § 40-11-302(b) insurance licensure exclusion, the Division does have licensure authority when a professional bondsman seeks to issue certain types of civil bonds.² *Id.* However, if a professional bondsman is licensed by the court in which he or she seeks to issue bonds, acts personally as surety on the financing for his or her issued bond, the bond's amount does not exceed ten thousand dollars (\$10,000), and the court regulations mandate a minimum of ten percent (10%) security on bonding activities, the Division has no authority to require licensure of this professional bondsman. *Id.* Irrespective of these exemptions, a bondsman is, at all times when acting as surety, and regardless of the type of bond sold, subject to investigation and administrative action deemed appropriate by the Division. § 40-11-302(d).

Notwithstanding Tenn. Code Ann. § 40-11-302(b), professional bondsmen require insurance licensure under multiple circumstances. Pursuant to Tenn. Code Ann. § 40-11-302(c), a bondsman qualifies as a candidate for insurance producer licensure under the Tennessee Insurance Law when he or she sells specified civil bonds, including *lis pendens*³ bonds, in excess of ten thousand dollars (\$10,000), or at any time without established court regulations mandating, at a minimum, ten percent (10%) security. Therefore, if the bond the professional bondsman seeks to write is a statutorily contemplated civil bond and exceeds ten thousand dollars (\$10,000), he or she is then required to have insurance licensure. *See id.* Again, if the court in which the bondsman seeks to issue a named civil bond does not have regulations instituting a minimum of ten percent (10%) security on the bonding activities, insurance licensure is required. *See id.* Essentially, if the professional bondsman fails to qualify for the Tenn. Code Ann. § 40-11-302(c) exception, and he is writing as surety statutorily specified civil bonds, he or she must have insurance licensure.

Additionally, when a professional bondsman writes bonds which are considered the business of insurance, insurance producer licensure is required. If a professional bondsman does not finance his own bonds, but instead presents an insurance company surety bond, the professional bondsman is considered to be writing insurance, and must be licensed by the Division. Lastly, if a professional bondsman writes a bond through a bonding company⁴ licensed under Tenn. Code

² Bonds contemplated in Tenn. Code Ann. § 40-11-302(c) include: appeal, attachment, certiorari, cost, detainer, *lis pendens*, possession, and restraining order bonds.

³ 1. A pending lawsuit. 2. The jurisdiction, power, or control acquired by a court over property while a legal action is pending. *Black's Law Dictionary*, *Lis Pendens* (10th ed. 2014).

⁴ Such regulated bonding companies execute as surety and guarantee the performance of: "(1) All bonds, stipulations, or undertakings conditioned for the faithful performance of any duty, public or private, including the bonds and obligations of such a character, as well of private individuals as of public officers, whether state, county, or municipal; (2) All bonds and obligations required to be executed in the course of judicial proceedings in any of the courts of the state; and (3) All bonds of administrators, executors, guardians and trustees, and of all persons acting in a fiduciary capacity, whether acting under the authority of any court of this state, or by virtue of a deed,

Ann. § 56-15-101 *et seq.*, the professional bondsman is required to hold insurance licensure.⁵ Tenn. Code Ann. § 56-15-108 (1963).

Once it is determined that a professional bondsman requires licensure, Tennessee Insurance Law provides a list of the lines of insurance in which an approved insurance producer may receive a license. *See* Tenn. Code Ann. § 56-6-107 (2008). However, Tenn. Code Ann. § 40-11-401 specifically requires bail bondsmen to have a limited insurance representative license from the Division. Nevertheless, Tenn. Code Ann. § 56-6-107(a)(8) provides that an insurance producer may receive a license in “[a]ny [] line of insurance permitted under this title or regulations promulgated under this title.” Historically, all other producers selling bonds have received casualty insurance producer licensure.⁶

Immigration bonds are instruments, specifically surety bonds, issued to secure the obligations owed to the United States by an illegal alien wishing to be released on bond pending a trial as to the alien’s status in this country. As a bond issued for the purpose of release pending trial, immigration bonds are *lis pendens* bonds, and are thus subject to the Tenn. Code Ann. § 40-11-302(c) considerations. Provided a professional bondsman does not satisfy the exemption, or is issuing such bonds for an insurance or bonding company, he or she is required to obtain insurance licensure from the Division. Such a professional bondsman would require a casualty insurance producer license.

II. Referral Fees and Commission Sharing for Referral of Immigration Bond Business

Under Tennessee Insurance Law, Tenn. Code Ann. § 56-6-113 provides guidance regarding commissions and referral fees for the sale of insurance, which, by extension, contemplates the sale of products such as immigration bonds, provided they are written on insurance company paper. Under limited circumstances, a professional bondsman may share commissions for the sale of immigration bonds with and may pay referral fees for referral of immigration bond business to unlicensed individuals.

Depending on the unlicensed individual’s involvement in the sale of the immigration bond, a professional bondsman may share commissions with an unlicensed individual. Tennessee Insurance Law specifically states, “[a] person⁷ shall not accept a commission, service fee,

will or other instrument executed by a private individual or corporation, or by virtue of any appointment to any position of trust or confidence by any private individual or corporation; provided, that no fidelity or bonding company shall receive deposits subject to check, or do a general banking business. . . .” Tenn. Code Ann. § 56-15-101 (1989).

⁵ The licensure requirement pursuant to Tenn. Code Ann. § 56-15-108 specifically states that it is unlawful for a corporation formed pursuant to Tenn. Code Ann. § 56-11-101 *et seq.* “to write or cause to be written any policy or fidelity contract, except through licensed resident agents who shall countersign and record the policies or contracts and receive the full commission usually paid on business of the same classification in this state.” However, the requirement that an individual selling a policy through such a company be a resident and countersign is repealed by implication by Tenn. Code Ann. § 56-6-122, which prohibits any countersignature requirements.

⁶ It is important to note that receipt of a license to sell bonds from the Division does not serve to license an individual to sell bonds in any given court. Licensure to sell bonds in a court is regulated by each court, and does not contemplate whether a professional bondsman holds insurance producer licensure with the Division.

⁷ For the purposes of this analysis, a person includes an individual or a business entity. Tenn. Code Ann. § 56-6-102(15) (2002); Tenn. Code Ann. § 56-8-102(a)(10) (2009).

brokerage or other valuable consideration for selling, soliciting or negotiating insurance in this state if that person is required to be licensed under this part and is not so licensed.” Tenn. Code Ann. § 56-6-113(b) (2008). However, “[a]n insurer or insurance producer may pay or assign commissions, service fees, brokerages or other valuable consideration to an insurance agency or to persons who do not sell, solicit or negotiate insurance in this state,” provided such does not constitute an unfair trade practice. § 56-6-113(d). Essentially, a producer may share commissions from the sale of an immigration bond with an unlicensed individual, so long as the unlicensed individual does not assist in the sale, solicitation, or negotiation of the immigration bond.

Similarly, a professional bondsman selling insurance-backed immigration bonds may pay referral fees to an unlicensed individual. Regarding referrals,

An unlicensed person may make a referral to a licensed producer; provided, that the person does not discuss the specific insurance policy terms and conditions. Except as prohibited by federal law, the unlicensed person may be compensated for the referral; however, an unlicensed person who is neither employed by nor affiliated with the insurance producer may be compensated only if the compensation is a fixed dollar amount, not to exceed twenty-five dollars (\$25.00) or such lesser amount as the commissioner may establish by rule, for each referral. An unlicensed person who is either employed by or affiliated with the insurance producer may be compensated only if the compensation is a fixed nominal dollar amount. In either event, the *referral compensation shall not depend on whether the referred customer purchases an insurance product* from the licensed producer.

§ 56-6-113(e) (emphasis added). Considering the statute, a professional bondsman may pay referral fees for the referral of immigration bond business, but the payment may not be contingent upon whether the referred individual actually purchases any products from the professional bondsman. A professional bondsman paying referral fees is restricted to paying a fixed referral payment, which may not be more than twenty-five dollars (\$25.00), and must be paid for each referral made, regardless of bond purchase.

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 the sale of immigration bonds pursuant to the Tennessee Insurance Law 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. T. Stephen Taylor 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.



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