

Regulatory Impact Statement for the 11 NYCRR 76 (Insurance Regulation 209).

1. Statutory authority: Sections 202 and 302 of the Financial Services Law and Sections 301 and 2307 and Articles 23, 24 and 34 of the Insurance Law. Financial Services Law Sections 202 and 302 and Insurance Law Section 301 authorize the Superintendent of Financial Services (the “Superintendent”) to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

Insurance Law Section 2307 sets forth the requirement that property/casualty insurance policies shall not be misleading or violative of public policy. Articles 23 (Property/Casualty Insurance Rates) and 34 (Insurance Contracts-Property/Casualty) are the general articles applicable to most property/casualty insurance policies. Article 24 prohibits any insurer from engaging in unfair methods of competition or unfair and deceptive acts or practices.

2. Legislative objectives: Correction Law section 753 states that the public policy of New York, as expressed in Correction Law Article 23 -A, is to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. The law forbids discrimination based upon a conviction for a previous criminal offense unless there is a direct relationship between one or more of the previous offenses and the specific employment sought or held by the individual; or the granting or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. Section 753 of the Correction Law specifies eight factors, including the public policy of the state, to be considered in making a determination pursuant to section 752.

However, commercial crime insurance policies often have provisions that will exclude coverage for loss or damage caused by an employee who has been convicted of a criminal offense, where the employer knew about the conviction prior to the loss or damage. This puts employers in the untenable position of either not being able to obtain insurance or violating the Correction Law by not hiring the individual, even though a

review of the Correction Law factors would weigh in favor of employment. Given the strong public policy of the State, the Superintendent has determined that it would be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state for an insurer that writes commercial crime insurance policies in this state to exclude coverage where the employer has weighed the factors and made a determination favorable to the employee.

3. Needs and benefits: This rule will prohibit an insurer that writes a commercial crime insurance policy from excluding coverage for loss or damage caused by an employee who has been convicted of one or more criminal offenses in this state or any other jurisdiction prior to being employed by the employer, provided that, after learning about the employee's past criminal conviction or convictions, the employer made a determination to hire or retain the employee utilizing the factors set out in Correction Law Article 23-A. This requirement will further the public policy of New York as stated in Correction Law Article 23-A. Because the employer would have to make a determination utilizing the statutory factors, the risk to insurers should be mitigated. The Department is not aware of any data that would indicate that an employee with a criminal history who has undergone a background check consistent with Article 23-A is any more of an insurance risk than an employee without such a criminal history. These factors include the specific duties and responsibilities necessarily related to the employment sought; the bearing, if any, the offense or offenses will have on the person's ability to perform these duties; the time that has elapsed since the time of the offense; the age of the person at the time of the offense, the seriousness of the offense, information about the person's rehabilitation and good conduct; and the legitimate interest of the employer in protecting property and safety.

4. Costs: Insurers that write commercial crime insurance will incur some one-time costs to revise their policy forms and, where the forms have to be filed with the Superintendent, to refile those forms with the Superintendent.

This rule does not impose compliance costs on state or local governments. The Department of Financial Services does not anticipate that it will incur additional costs, although there will be an increased number of filings.

5. Local government mandates: This rule does not impose any program, service, duty or responsibility upon a city, town, village, school district or fire district.

6. Paperwork: Insurance companies will have to submit appropriate filings.

7. Duplication: This rule will not duplicate any existing state or federal rule.

8. Alternatives: One alternative would be to continue to allow insurers to exclude the coverage. However, it is unacceptable not to protect employers against losses when they are complying with the strong public policy of the State in hiring individuals who have been convicted of criminal offenses. Another alternative would be simply to prohibit insurers from excluding coverage, regardless of whether the employer considered the Article 23-A factors. However, that would impose a greater risk on insurers than would be necessary to implement the State's public policy mandate.

9. Federal standards: There are no federal standards.

10. Compliance schedule: The rule would be effective 90 days after publication in the State Register with respect to all policies issued, renewed or delivered in this State on or after that date. This should give insurers sufficient time to revise their policy forms and to make appropriate policy form filings with the Superintendent.

Regulatory Flexibility Analysis for Small Businesses and Local Governments for new 11 NYCRR 76 (Insurance Regulation 209).

1. Effect of rule: This rule will prohibit a property/casualty insurer that writes a commercial crime insurance policy from excluding coverage for loss or damage caused by an employee who has been convicted of one or more criminal offenses in this state or any other jurisdiction prior to being employed by the employer, provided that, after learning about the employee's past criminal conviction or convictions, the employer made a determination to hire or retain the employee utilizing the factors set out in Correction Law Article 23-A.

Property/casualty insurers generally do not fall within the definition of a "small business" as defined by the State Administrative Procedure Act § 102(8), because in general they are not independently owned and do not have fewer than 100 employees.

Industry has asserted in the past that certain domestic insurers, in particular co-op insurers and mutual insurers, subject to the rule are small businesses. The Department does not readily know whether any insurer that may be a small business is in fact writing commercial crime insurance.

2. Compliance requirements: A local government will not have to undertake any reporting, recordkeeping, or other affirmative acts to comply with the rule since the rule does not apply to a local government. However, an insurer that may be a small business will need to revise its commercial crime insurance policy forms if it is currently writing such coverage.

3. Professional services: A local government will not need any professional services to comply with this rule since the rule does not apply to a local government. It is not anticipated that an insurer that may be a small business will need to utilize any professional services that it does not already utilize in preparing policy forms and rate filings.

4. Compliance costs: A local government will not incur any costs to comply with this rule since the rule does not apply to a local government. An insurer that writes commercial crime insurance will incur some one-

time costs to revise its policy forms and, where the forms have to be filed with the Superintendent, to refile those forms with the Superintendent. The costs are expected to be minimal because insurers routinely make policy form and rate filings.

5. Economic and technological feasibility: Economic and technological feasibility is no concern for local governments because the rule does not apply to local governments. An insurer that has to make a rate or form filing in response to this rule would do so by the same method and manner that it already makes rate and form filings, so there should be no issue regarding the economic or technological feasibility of the rule.

6. Minimizing adverse impact: There will not be an adverse impact on a local government since the rule does not apply to a local government. While an insurer would have to provide coverage to an employer for acts of employees that are currently being excluded from coverage, the Department does not anticipate any adverse impact on insurers. The Department is not aware of any data that would indicate that an employee with a criminal history who has undergone a background check consistent with Article 23-A is any more of an insurance risk than an employee without such a criminal history. These factors include the specific duties and responsibilities necessarily related to the employment sought; the bearing, if any, the offense or offenses will have on the person's ability to perform these duties; the time that has elapsed since the time of the offense; the age of the person at the time of the offense, the seriousness of the offense, information about the person's rehabilitation and good conduct; and the legitimate interest of the employer in protecting property and safety.

7. Small business and local government participation. The Department has sent the draft proposal to industry trade groups and is awaiting feedback from those groups, including from any insurers in rural areas. In addition, those insurers will have an opportunity to participate in the rule making process when the proposed rule is published in the State Register and posted on the Department's website.

Statement setting forth the basis for the finding that the adoption of 11 NYCRR 76 (Insurance Regulation 209) will not impose adverse economic impact or compliance requirements on rural areas.

The Department of Financial Services (“Department”) finds that this rule does not impose any additional burden on persons located in rural areas, and will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

Rural area participation: The Department has sent the draft proposal to industry trade groups and is awaiting feedback from those groups, including from any insurers in rural areas. In addition, those insurers will have an opportunity to participate in the rule making process when the proposed rule is published in the State Register and posted on the Department’s website.

Statement setting forth the basis for the finding that the adoption of 11 NYCRR 76 (Insurance Regulation 209) will not have a substantial adverse impact on jobs and employment opportunities.

The Department of Financial Services finds that this rule should not have any negative impact on jobs and employment opportunities. The rule simply requires property/casualty insurers that write commercial crime insurance policies to provide coverage for loss or damage caused by an employee who has been convicted of one or more criminal offenses in this state or any other jurisdiction (prior to being employed by the employer), provided that, after learning about the employee's past criminal conviction or convictions, the employer made a determination to hire or retain the employee utilizing the factors set out in Correction Law Article 23-A. If anything, the rule may make the policies more desirable to insureds and may increase the likelihood that they would purchase the coverage.