THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee

FROM: Lenore S. Marema
Vice President—Government Affairs

RE: June State Legislative Report—Recent Enactments in Contract Surety

DATE: June 7, 2006

The following is a list of laws affecting contract surety that were enacted into law in May 2006.

ALABAMA

HB 68—Contractor Immunity
HB 68 amends the Good Samaritan Law to give licensed contractors and subcontractors immunity from civil damages for any work done without compensation within 30 days after a declaration of an emergency.

HJR 653—Study Commission
This Resolution creates a Building Code Study Commission to make recommendations to the Governor prior to the fifth day of the 2007 legislative session.

COLORADO

HB 1077—Indemnity Agreements—VETOED
The Governor vetoed this bill, which would have voided indemnity agreements in construction contracts.

HB 1343—Employment of Illegal Aliens
The new law creates the Basic Pilot Employment Verification Program. It prohibits a state agency or political subdivision from entering into or renewing a public contract with a contractor who knowingly employs or contracts with subcontractors that employ illegal aliens. Prior to contracting, the contractor must certify that it does not knowingly employ illegal aliens and that the contractor has participated in the basic pilot program to verify that it does not employ illegal aliens. Public contracts must contain provisions prohibiting the knowing employment of illegal aliens. If a contractor violates the law, the public owner may terminate the contract for breach of contract; and the contractor shall be liable for the actual and consequential damages.

CONNECTICUT

HB 5677/SB 493—Waiver of the Surety's Defenses

As originally drafted and introduced as HB 5187, a surety would have waived all of its defenses to a claim if the surety did not respond to a claim within 90 days either by paying the claim or by identifying the portions that are in dispute. SFAA worked with AIA and NASBP on talking points to oppose the bill, and SFAA drafted amendments in the event that the bill would proceed. In our proposed amendments, the surety did not waive any statutory defenses or any defenses of the principal. After negotiation with the sponsor, a substitute bill was introduced in which the provision regarding the surety's waiver of defenses was removed. The bill passed, and the Governor signed it into law.

FLORIDA

SB 1350—DOT Bond Threshold

SB 1350 allows maintenance contractors on long-term Department of Transportation (DOT) projects to post only bonds necessary to cover the next year's work. Furthermore, the new law raises the threshold for DOT contracts from $150,000 to $250,000 and permits the DOT to accept alternative security on DOT projects for amounts in excess of $250 million. SFAA discussed the bill with DOT and wanted to amend the bill so that it could not be misread to allow the DOT to waive all bonds over $250 million, but the DOT assured SFAA that this would be remedied in the regulations so that it is clear that bonds will be required for amounts under $250 million and alternative security will be considered for amounts over that. SFAA opposed the increase in the bond threshold for the DOT.

SB 1940—Statute of Repose

The new law shortens the time in which an action can be brought based on the design, planning or construction of an improvement to real property by reducing the statute of repose from 15 to ten years. SFAA, AIA and the local surety association supported this effort.

GEORGIA

HB 1177—DOT Bond Threshold

The new law allows the Department of Transportation, on projects that exceed $300 million, to make a determination that 100% bonds are not reasonably available. It then has to require payment and performance bonds of not less than $300 million and protect the balance of construction costs with a combination of letters of credit and corporate guarantees. SFAA member company representatives and staff assisted in crafting this bill.

IOWA

SB 2364—Service of Process

As originally drafted, SB 2364, the Iowa Insurance Department's legislative package, contained a provision to repeal the requirement that the Insurance Commissioner act as agent of service of process for insurers. The Department bill would have caused SFAA members to begin filing an agent for service of process in the Iowa federal district courts. SFAA worked with AIA to craft an amendment that designates the Secretary of State to receive service of

process for sureties for purposes of 31 USC 9306, to the extent the surety cannot otherwise be served in Iowa. Insurers otherwise file a resident agent for licensure. At the eleventh hour, the trial lawyers complained about the Department no longer accepting service of process, so the provisions were added back to the Insurance Code in addition to the new option of allowing the Secretary of State to accept service of process. The Insurance Department is now permitted to charge a reasonable fee for acting as agent for service of process.

LOUISIANA

HB 1294—Public/Private Construction Agreements
The bill would authorize the Louisiana Transportation Authority to pursue public-private agreements for the construction of specified facilities. Payment and performance bonds **would be required.**

MARYLAND

HB 169—Individual Sureties
The new law allows individual sureties to write surety bonds in Maryland without being licensed as a surety. SFAA worked closely with AIA local counsel to approach the bill sponsors regarding the potential for fraud that this bill would create. SFAA also testified when the bill was heard; and SFAA, AIA and NASBP provided alternative language. The bill passed, however, without any of the industry-sponsored suggestions or protections for the State, as it was perceived as assisting small and emerging contractors. In addition to allowing individual sureties to write bonds without pledging verifiable assets to the State, the bill will increase the size of the surety bond guaranty available from the Maryland Small Business Development Financing Authority to $1,350,000, and the size of the bond MSBDFA can write directly to $5,000,000. Lastly, the new law includes a reporting requirement on the impact of the bill on small businesses and minority businesses and a three-year sunset.

HB 869—Minority Business
HB 869 extends until July 1, 2011, the provisions in the State Procurement Law regarding minority businesses. A final study of the Minority Business Enterprise Program must be submitted to the Legislature before September 30, 2010.

MINNESOTA

HB 2480—New Stadium Construction
HF 2480/SB 2297 creates a new baseball authority to build a new stadium for the Minnesota Twins. As originally drafted, the bill had bond provisions that made surety bonding on the project discretionary. SFAA worked with AIA, and the bill that came out of conference makes bonds mandatory. The new law provides that the bonds must cover any costs that may be incurred in excess of the contractor's certified price, including, but not limited to, costs incurred by the authority or loss of revenues resulting from incomplete construction on the completion date.

MISSOURI

HB 1380—New Tollway Construction ***To Governor***

HB 1380 allows a public-private partnership to finance, develop and operate a toll bridge between Illinois and Missouri. Bid bonds would not be required on the project, but the Missouri Highways and Transportation Commission could require performance and payment bonds. This bill has passed the House and Senate.

OKLAHOMA

HB 2083—Indemnity Provisions

The new law makes any provision in a construction contract void and unenforceable that requires any entity or its surety to indemnify, insure, defend or hold harmless another entity for liability for death or bodily injury or damage of property based on the indemnitee's negligence or fault. This does not affect provisions requiring a surety or insurer to indemnify another entity.

SB 588--State Bond Threshold

SB 588 raises the state bond threshold from $25,000 to $50,000. As originally drafted, the bill would have raised the threshold to $100,000. The new law also provides that contracts less than $50,000 must be let to the lowest responsible bidder through written bids and that contracts of less than $2,500 for repairs and maintenance can be negotiated with a qualified contractor. With regard to public school districts, contracts under $25,000 may be negotiated with a qualified contractor; and contracts between $25,000 and $50,000 must be let to the lowest responsible bidder through written bids. The new law also provides that, when all bids for a public construction project exceed an agency's estimate and available funding, the State Contract Administrator may enter into negotiations with the lowest responsible bidder for the purpose of modifying the project scope and reducing the construction cost.

VIRGINIA

HB 64-State Bond Threshold

HB 64 raises the threshold for surety bonds on public works projects from $100,000 to $250,000 for state Department of Transportation (DOT) projects. The original bill would have increased the state bond threshold from $100,000 to $500,000 for all public construction projects. SFAA and AIA worked together on this bill, with AIA organizing substantial local opposition and SFAA providing testimony, talking points and letters to the Legislature from the local surety association and SFAA staff.

HB 1259—Bonding Requirements

Existing law requires payment and performance bonds on any public construction project exceeding $100,000 or on any contract in excess of $100,000 requiring the furnishing of labor or materials for buildings or improvements to real property owned or leased by a public body. HB 1259 adds that bonding also is required on any contract in excess of $100,000 on which the performance of labor or furnishing of material will be paid with public funds.

HB 1502/SB 675—Bond Threshold for Universities
HB 1502 creates management agreements between the State of Virginia and Virginia Polytechnic Institute and State University, the University of Virginia and the College of William and Mary to allow these educational institutions greater freedom in many procurement functions, including construction projects. The law sets forth the terms and conditions under which these universities must manage their operations, which include procurement provisions that differ in whole or in part from the public procurement laws, including bonding requirements. Bid, performance and payment bonds would be required on projects costing more than $1 million. This would not prohibit the universities from requiring bonds on less costly projects.

The following is an overview recent SFAA activities regarding 2006 state legislation affecting contract surety in key areas that the SFAA has tracked or been involved. More details and the effective dates of the legislation summarized in this report are available in the monthly reports on the SFAA website. Please let us know if you need any assistance in accessing the Members Only section of our website.

Overview

The following state legislatures remain in their 2006 sessions: **California, Delaware, District of Columbia, Illinois, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania** and **Wisconsin**.

New York adjourned its regular session on June 23. The legislature will reconvene for one or more special sessions in the fall. While no surety legislation is likely to be considered then, there are a number of bills of interest that the SFAA will monitor. **Delaware** and **New Hampshire** are on the brink of adjournment. The last scheduled legislative day in Delaware is June 30, and the last day in New Hampshire was supposed to be June 28; but the legislature remains in session, largely considering gubernatorial vetoes.

North Carolina went into session on May 9 and is due to adjourn on August 4.

The following states have adjourned their 2006 regular session: **Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii**, **Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Nebraska, New Mexico, Oklahoma, South Dakota, Rhode Island, South Carolina, Tennessee, Vermont, Utah, Virginia, Washington, West Virginia and Wyoming.**

Arkansas, Montana, Nevada, North Dakota, Oregon and **Texas** are not in regular session in 2006.

Key Issues Still Pending in the States

• **Immigration Issues**

Although **Missouri** went out of session on May 26 and SB 1250 officially died, the immigration issue is still being considered in interim hearings. SB 1250 would prohibit contractors on public projects from employing illegal aliens as workers or using subcontractors that employ illegal aliens. The bill would make it a material breach of contract to have illegal aliens working on a public project and would require the public owner to terminate the contractor if illegal aliens were found on the job. The bill also would require construction contracts to contain a provision that the performance bond would hold the public entity harmless for any losses due to the breach of the contract. Any interested party would be permitted to bring a suit to enforce the law, in addition to the state Attorney General.

The **Missouri** House Special Committee on Immigration has conducted two hearings, and there are tentative plans for four more hearings. No formal action can be taken on any issue until the legislature goes back into session, but a final report is prepared from these proceedings. Such reports generally become the starting point for legislation in the next session. For that reason, SFAA and NASBP thought it necessary to make a public appearance and present our view of the bonding problems that SB 1250 would create so that they would be reflected in any final report from these hearings. The local AGC association took the lead in the testimony, and some local NASBP members presented the surety perspective by way of a joint statement that SFAA and NASBP prepared on the impossibility of underwriting the bond contemplated under SB 1250 and the marketplace disruptions that could result from this bill, none of which benefit the State or the taxpayers. SFAA and NASBP are being cautious at this point about our public involvement on this issue until it clear whether these are sustentative hearings or politically motivated hearings on a controversial public policy issue in an election year. AIA intends to submit written comments to the Committee.

On June 6, the **Colorado** Governor signed HB 1343 into law. The new law creates the Basic Pilot Employment Verification Program. It prohibits a state agency or political subdivision from entering into or renewing a public contract with a contractor who knowingly employs or contracts with subcontractors that employ illegal aliens. The law requires contractors to participate in a specified federal pilot project Administered by the Department of Homeland Security for purposes of checking the status of employees. Prior to contracting, the contractor must certify that it does not knowingly employ illegal aliens and that the contractor has participated in the basic pilot program to verify that it does not employ illegal aliens. Public contracts must contain provisions prohibiting the knowing employment of illegal aliens. If a

contractor violates the law, the public owner may terminate the contract for breach of contract; and the contractor shall be liable for the actual and consequential damages.

● Individual Surety

North Carolina is one of the few late-starting state sessions. HB 2793, an individual surety bill, has been introduced. Relatively speaking, the bill is "better" than the Maryland bill that was enacted this year, which is summarized below. The North Carolina bill is patterned more closely on the federal regulations, but still does not subject individual sureties to licensure and regulation under the state insurance code. The bill would also require state contracting officers to determine the validity of the assets of an individual surety. At this point, the best intelligence out of North Carolina is that the bill will not move. The local AGC is committed to strongly oppose the bill.

The **Louisiana** Senate passed Resolution 158, which calls for a study of the feasibility of permitting individual sureties to provide surety bonds on public works projects, with the possibility of legislation there in 2007. In the resolution it is noted that small, local contractors obtain bonding through the "federal individual surety program, but state bonds can be written only by licensed and domiciled sureties, such contractors frequently have trouble obtaining bonding. Right now, SFAA is attempting to learn how and when this study will proceed. SFAA plans to take an active role in the study process. It appears that there is a nationwide push on the issues of individual sureties and bonding for small and emerging contractors, and that these issues are coming together in states like Maryland, North Carolina and Louisiana.

● Mandatory Arbitration

As originally drafted, **New Jersey** SB 1726 would have required that all construction payment disputes go to arbitration with the American Arbitration Association (AAA). The bill has been amended in the House to require all construction contacts in New Jersey to provide that payment disputes may be sent to alternative dispute resolution. To the extent that such disputes are litigated, the case must be heard in New Jersey; and attorneys' fees are awarded to the prevailing party. The revised bill seems to encourage some form of alternative dispute resolution. The bill applies to private and public construction projects. While the Senate bill has been amended, its companion in the Assembly, AB 3174, must be amended as well if and when that bill moves in the Assembly.

● Eligibility Requirements for Surety

New Jersey SB 1392 would give all municipalities and counties the authority to set their own requirements for sureties. The bill was amended to further require that the surety eligibility requirements conform to existing law under which the surety has to be either: a licensed insurer in the State, on the US Treasury list or have one of the three highest ratings from a nationally recognized rating organization, depending on the size of the bond. The substitute bill retains the language from the original bill that would give municipalities and counties the discretion to look at other factors, including, but not limited to, the rating of the surety from a nationally recognized rating organization, other information about the surety's financial condition and the surety's past performance in meeting its obligations. SFAA remains concerned that this bill may well be implemented in such a way that the existing requirements in the law become a floor, upon which each county and municipality can build upon with its own eligibility requirements for sureties. The bill is not moving any further this point.

● **Prevailing Wages**
This issue continues to surface in **New York** and again came dangerously close to enactment late in the session. The bills that were pending would have provided for damages in the amount of three times the unpaid wages, attorneys' fees and expenses, as well as a 25% penalty to the State if a contractor did not pay the prevailing wage. AB 4040 passed the Assembly and was sent to the Senate on June 16, and SB 4857, a similar bill, got out of committee and as far as the Senate floor calendar by the time the legislature adjourned its regular session on June 23. The legislature will come back for one or more special sessions this fall. While it is unlikely that this or any other surety issue will be acted on in the special sessions, SFAA will continue to monitor this bill and is ready to oppose it.

State Bond Threshold Legislation

An increasingly frequent state legislative initiative attributed to the lack of bonds for disadvantaged contractors is the raising of the state bond thresholds for requiring bonds under the Little Miller Acts. The SFAA opposes all increases in the thresholds. SFAA works to stop them if they are a significant increase, trying to keep state thresholds at $25,000. AIA works to oppose any threshold above $50,000.

This year, SFAA worked with AIA to stave off an increase in the bond threshold in **Indiana.** SB 360, which would have raised the state bond threshold to $500,000, failed to pass this year in Indiana. SFAA staff spent several days in Indianapolis with the AIA regional manager and state counsel, together persuading the associations for the cities, towns and counties to oppose the bill and the local contractor associations and chambers of commerce to support alternatives, including the SFAA Model Contractor Development Program. SFAA killed the legislation this year, but now the issue of bonding for small and minority contractors still needs to be addressed. SFAA plans to work with the local surety association on a contractor education program, and we are in the process of arranging that meeting. Indiana is a good model for the other states, in that SFAA avoided an increase in the state bond threshold because it had a convincing alternative to the problem.

Virginia HB 64 raised the threshold for surety bonds on public works projects from $100,000 to $250,000 for state Department of Transportation (DOT) projects. The bill passed both houses and was sent to the Governor, who sent it back to the House with amendments that remove the limit to DOT projects, so that the bill would effectively increase the state bond threshold to $250,000 for all public projects. The legislature rejected the Governor's amendment, and the Governor signed the bill as a threshold increase for DOT projects. This bill was part of the new Governor's package of legislation designed to assist small and minority businesses in the state. The original bill would have increased the state bond threshold from $100,000 to $500,000 for all public construction projects, so it is not surprising that the Governor wanted to expand the bill; but it is disappointing that the Governor ignored the compromise that was reached in the legislative process. SFAA and AIA worked together on this bill, with AIA organizing substantial local opposition and SFAA providing testimony, talking points and letters to the Legislature from the local surety association and SFAA staff.

The minority contractor issue came up in the context of individual surety legislation in **Maryland** HB 169, which now allows individual sureties to write surety bonds in Maryland

without being licensed as a surety -- in contradiction to the Insurance Code. This bill only had traction because it was presented as a way to assist small and minority contractors to get bonds. SFAA worked closely with AIA local counsel to approach the bill sponsors regarding the potential for fraud that this bill would create. SFAA also testified when the bill was heard. The sponsor indicated that the bill needed work; and SFAA, AIA and NASBP provided alternative language. The bill passed, however, without any of the industry-sponsored suggestions or protections for the State. In addition to allowing individual sureties to write bonds without pledging verifiable assets to the State, it will increase the size of the surety bond guaranty available from the Maryland Small Business Development Financing Authority to $1,350,000, and the size of the bond MSBDFA can write directly to $5,000,000. Finally, the bill includes a reporting requirement on the impact of the bill on small businesses and minority businesses and a three-year sunset. HB 169 and the Senate companion bill -- SB 391 -- both have passed with unanimous votes and the Governor signed the individual surety bill into law. These bills become effective on October 1. Based on this year's experience, there could be bond threshold legislation next year in Maryland.

Utah raised the state bond threshold from $50,000 to $100,000 by regulation, but this has not been presented as a minority contractor issue. The Utah Administrative Services office indicated that it was its intent to expand the definition of a "small contract" that is exempt from the full state procurement process. Under the existing regulation, the State needs to solicit at least two written quotations on any contract under $50,000 and must award it to the lowest bidder. The state contends it merely wants to expand this authority to $100,000, but its proposed regulation also increases the state bond threshold. SFAA, AIA and NASBP submitted joint comments that showed the State how to achieve its purpose without changing the bond threshold and argued the merits of retaining the $50,000 bond threshold.

In **Oklahoma,** SB 558/HB 1770, which originally would have raised the limit from $25,000 to $100,000, was amended to $50,000 and is in conference committee, having passed both houses.

●**Defeated Bills.** Legislation to increase state bond thresholds was defeated this year in **Iowa**, **Kansas, Missouri** and **Washington.** Iowa HB 449/SB 1219 would have amended numerous thresholds in the public contract law and would have raised the bond thresholds from $25,000 to $100,000. Kansas HB 2186 would have raised the threshold from $10,000 to $100,000. Missouri HB 1223 would have raised the bond threshold from $25,000 to $100,000. Washington HB 1138/SB 5249 would have permitted state agencies to waive bonds and retainage on contracts under $200,000, in which case the State assumed liability for payment for amounts due from the general contractor, if not paid. In **South Carolina** HB 3653 would have defined a "historically underutilized business" (HUB) and provided a budget for the General Services Division to establish a program to help HUBs obtain surety bonds, including contracting for the implementation of the program. The bill died.

● **Other New and Carryover Threshold Legislation. California** HB 2833 would raise the bond threshold from $15,000 to $50,000 for projects let by school districts. This 2006 introduction is not moving.

In **Pennsylvania**, a whole string of bills carried over that would raise the threshold for requiring bonds from $10,000 to $25,000 for specific political subdivisions or building

authorities. The bond threshold would be adjusted yearly thereafter, based on changes to the Consumer Price Index (CPI). These bills include HB 1854, 1855, 1856, 1857, 1859, 1871 and 1872. HB 1860 is similar, but it raises the bond threshold from $4,000 to $10,000 on projects of the public school construction authority.

New York had the most onerous carryover legislation from 2005. AB 9069 would have allowed the threshold for requiring performance and payment bonds on public contracts in New York to be raised to $500,000 for small businesses and minority and women-owned businesses. Advertisements for bids shall provide information as to the requirements for, or waiver of, performance and payment bonds. New York is out of session, and this bill should be dead.

Also likely dead in 2006 is **New York** HB 9070, which would have increased the size of the Minority and Women Owned Business Advisory Board in the Division of Minority and Women Owned Business Development and the size of the Small Business Advisory Board in the Division of Small Business, each by two members. In addition, the bill would have directed the Division of Small Business to provide programs educating small contractors about surety bonding requirements on state contracts and identifying resources available to such contractors in obtaining their first bond and in increasing their bonding capacity, including, but not limited to, the federal Small Business Administration Bond Guarantee Program. The Division of Small Business would have been required to maximize the use of federal surety bond guarantees and other assistance programs. The bill passed the Assembly but never moved in the Senate.

● **Bond Threshold for Specific or Mega Projects.** There also have been some bills introduced in 2006 to change the bond thresholds for specific projects or for mega-projects, particularly state transportation projects. For many of these projects, SFAA has seen that the public owners intend to require bonds but want to include permissive, rather than mandatory, language in the bills because of concerns that the projects are so large that there may be an issue of bond availability. In some cases, however, the emerging contractor concern has arisen.

In terms of enactments to date, **Georgia**, HB 1177 allows the Department of Transportation, on projects that exceed $300 million, to make a determination that 100% bonds are not reasonably available It then has to require payment and performance bonds of not less than $300 million and protect the balance of construction costs with a combination of letters of credit and corporate guarantees. SFAA member company representatives and staff assisted in crafting this bill. **Indiana** SB 259 allows the Indiana Convention and Stadium Building Authority to waive payment bond requirements on capital improvement projects provided that: (1) that (a) an otherwise responsive and responsible bidder is unable to provide the payment bond or (b) the cost or coverage of the payment bond is not in the best interest of the project and (2) that an adequate alternative is provided through a letter of credit, additional retainage of at least ten percent (10%) of the contract amount, a joint payable check system or other sufficient protective mechanism. **Minnesota** HF 2480/SB 2297 creates a new baseball authority to build a new stadium for the Minnesota Twins. As originally drafted, the bill had bond provisions that made surety bonding on the project discretionary. SFAA worked with AIA, and the bill that came out of conference makes bonds mandatory. The new law provides that the bonds must cover any costs that may be incurred in excess of the contractor's certified

price, including, but not limited to, costs incurred by the authority or loss of revenues resulting from incomplete construction on the completion date. SFAA and AIA opposed this portion of the bill.

Virginia HB 150 creates management agreements between the State of Virginia and Virginia Polytechnic Institute and State University, the University of Virginia and the College of William and Mary to allow these educational institutions greater freedom in many procurement functions, including construction projects. The new law sets forth the terms and conditions under which these universities must manage their operations, which include procurement provisions that differ in whole or in part from the public procurement laws, including bonding requirements in any construction they undertake. Bid, performance and payment bonds would be required on projects costing more than $1 million.

Missouri HB 1380 would allow for a public-private partnership to finance, develop and operate a toll bridge between Illinois and Missouri. Bid bonds would not be required on the project, but the Missouri Highways and Transportation Commission could require performance and payment bonds. This bill has passed the House and Senate and has been sent to the Governor for signature.

● **Defeated. Florida** HB 7077 would have permitted the Orlando-Orange County Expressway Authority to waive performance and payment bond requirements on projects costing less than $500,000 when the project has been awarded in a way to encourage local small business participation. The Authority would be obligated to pay all those who would have normally found protection under the payment bond had it not been waived. This bill is similar to bills previously enacted for projects in Hillsborough County (Tampa) and Jacksonville, Florida.

Florida SB 1350 passed both houses and was sent to the Governor for signature. The Governor vetoed the bill on Jun 27. It would have allowed maintenance contractors on long-term Department of Transportation (DOT) projects to post only bonds necessary to cover the next year's work. Furthermore, the bill would have raised the threshold for DOT contracts from $150,000 to $250,000 and would have permitted the DOT to accept alternative security for DOT projects in excess of $250 million. SFAA discussed the bill with the DOT and wanted to amend the bill so that it could not be misread to allow the DOT to waive all bonds over $250 million, but the DOT assured SFAA that this would be remedied in the regulations. SFAA opposed the increase in the bond threshold for the DOT. The veto had nothing to do with the surety issues. The Governor opposed a new tax provision under which municipalities would have been allowed to impose a surcharge on rental vehicles. The provisions impacting surety may well be back in 2007.

Retainage Legislation

This is a perennial legislative issue for SFAA, although it has not been an active issue in the 2006 sessions to date. SFAA supports the judicious use of retainage in private and public construction projects. SFAA opposes any bill in which the retainage will be reduced to less than 5% and works to oppose reductions to amounts above 5%. A number of retainage bills have been introduced in 2006.

--2006 Enactments. Indiana SB 359 is a new law that repeals the existing requirement that retainage must be placed in an escrow account if portions of the contract are subcontracted. Originally, the bill would have increased the amount of retainage held. Under existing law, either 6% can be held until 50% completion with nothing held thereafter, or 3% can be held until work is satisfactorily complete. This bill would have raised the percentages retained to 10% and 5% respectively, but the provision increasing retainage was removed from the bill during the legislative process. **Virginia** HB 1502 creates management agreements between the State and its major universities, there are provisions for construction projects at these educational institutions. Retainage in any such construction project would be limited to 5%.

New Hampshire HB 1107 would have established laws for commercial construction contracts. Such contracts were defined as being greater than $25,000, not a public works project, not funded or insured by HUD and, if for residential occupancy, containing more than four units. Retainage could not exceed 7.5% and would have been placed in an escrow account. The bill was deferred to the Commerce Committee for interim study.

● **Defeated. Iowa** SB1199 would have reduced substantially the retainage that must be held on construction projects under the control of the state board of regents. Under the bill, payments would have been made without retainage until the project is 95% completed. Thereafter, contractors could have demanded release of any retainage held. **Illinois** SB 2742 would have limited retainage to 10%, reduced to 5% after 50% of the contract was complete. There is no specific percentage requirement in existing Illinois law. The bill did not move. **Kansas** SB 516 would have limited retainage on public contracts to 5%. The bill passed the Senate, but died in the House. **Maryland** HB 488 would have limited retainage to 5%. The bill passed the House but died in the Senate. **Washington** HB 1138/SB 5249 would have allowed the government to waive retainage and payment and performance bonds on small works projects, which are construction projects under $200,000**.**

● **Other New and Carryover Retainage Legislation. California** AB 245 would have added Orange County to the list of counties that are permitted to enter into design build contracts for contracts in excess of $10 million. In such contracts, retainage may not exceed 5% if payment and performance bonds are in place. If enacted, the same authority that exists for seven other counties would sunset. The bill was gutted, and a substitute bill was enacted that was not related to surety. California is in session until August 31. SB 920 would permit a contractor to hold no more than 5% retainage and would require the contractor to pay retainage within seven days of completion on federally funded Department of Transportation contracts. Retainage is permitted only if the contractor requires bonds from the subcontractor, and the bonds are not provided. (*The bill has not moved in 2006.* **New York** AB 2721/SB 2547 would have required retainage on private contracts to be held in an escrow account and would have subjected the owner to payment of 1% interest if retainage was not released at the appropriate time. The Assembly bill passed, and the Senate companion made it to the Senate calendar; but it was not enacted before New York adjourned. **New York** SB 2549/AB 6035 would require that the retainage would have to be reduced by 50%, and 50% of the retainage would have to be released when 50% of the public project is completed. *(Remains in committee.)* AB 6600/SB 3161 would permit retainage at 20% if payment and performance bonds were waived. (Remains in *committee.)* **Ohio** HB 497 would limit retainage to 8% for the first 50% of the job. Retainage could not be held for materials delivered or otherwise approved. Attorneys' fees could be rewarded in suits to claim retainage held. This bill was

introduced in 2005 and did not move because all interested parties could not reach a consensus.

Pennsylvania HB 652 would reduce retainage on public projects to 6% or less until half of the work is complete. Under the current law, retainage is 10%. The bill also would reduce the retainage that can be held after the project is 50% completed from 5% to 3%. (*Filed.)* HB 1514 would increase, from 50% to 80%, the amount of retainage that must be returned to contractors when a project is 50% complete. After a project is 50% complete, retainage cannot be more than 2%. (*Introduced.)* HB 1878 would provide that a construction code or municipal code official may not issue a certificate of occupancy until the owner certifies that all retainage for contractors, subcontractors and materials suppliers have been released.

In addition, there were a number of carryover bills in **New York,** each applicable to one specific project, which would require 5% retainage if payment and performance bonds were in place and 10% if there were no bonds. These bills are AB 40/SB 89, AB 42/SB 91, AB 1021, AB. 6196, SB 3068, SB 3072, SB 4415 and AB 8144. SB 89 and SB91 got to the Senate calendar, but the companion bills did not move in the Assembly. Most of these bills did not move at all.

Bad Faith Was Defeated in the 2006 State Sessions

Bad faith legislation moved, but was defeated in **Rhode Island** and **Louisiana.** Generally, the bad faith issue arises as it did under **Louisiana** SB 707, which was a bill that would have given third parties a cause of action against insurers. The bill did not exclude sureties from its provisions. The bill passed the Senate, but did not pass out of the House Insurance Committee. SB 620, however, passed the House, and was sent to the Governor for signature on June 16. SB 620 amends the Insurance Code provisions on regulation of provisions in insurance contracts, such as cancellations and non-renewals. The bill would require insurers to pay an additional 50% of the damages, plus attorneys' fees and costs, if a claim is not paid within 30 days. Currently, the penalty is an extra 25% and no attorneys' fees are awarded. There are some hurdles in existing law that the plaintiff must meet in order to get to a penalty award. First, the 30-day period for payment starts when "satisfactory written proofs and demands for payment" are made. The plaintiff cannot, under current law, just send an insurer a demand for money. Second, the penalty is triggered only when the failure to act as required in 30 days is "arbitrary, capricious, or without probable cause." When the penalty is triggered, however, the attorneys' fees are most likely going to be an expensive component. While the Legislature is in session, the Governor has ten days from presentment to take action on the bill.

Senate Bill 2182 in **Rhode Island** would have permitted "any obligee, principal or claimant under any performance or payment bond" to sue the surety on the bond for bad faith failure to pay or settle a claim. This bill would have created a cause of action against sureties for bad faith. It passed the Senate but did not get out of Committee in the House.

Wyoming HB 68, which would have created a third party bad faith and direct action law, was killed on the House floor this year.

Service of Process Surfaces

SFAA drafted amendments, and AIA state counsel successfully had them added, to **Indiana** HB 1359 to solve the long-standing service of process issue for sureties in Indiana. The new law requires foreign insurance companies that write surety bonds to appoint the Insurance Commissioner as the agent for service of process. Prior to this session, Indiana and Nebraska were the only two states that did not have a state official to receive service of process for purpose of 31 USC 9306, so that SFAA members had to file an agent for service of process in the federal district courts of those states if they wrote any bonds required or permitted for the federal government. The new law is effective July 1.

Iowa SB 3125, the Iowa Insurance Department's legislative package, contained a provision to repeal the requirement that the Insurance Commissioner act as agent of service of process for insurers. As drafted, the Department bill would have caused SFAA members to begin filing an agent for service of process in the Iowa federal district courts. SFAA worked with AIA to craft an amendment which designates the Secretary of State to receive service of process for sureties for purposes of 31 US C 9306 to the extent the surety cannot otherwise be served in Iowa. Insurers otherwise file a resident agent for licensure. In the eleventh hour, the trial lawyers complained about the Department no longer accepting service of process, so the provisions were added back to the Insurance Code in addition to the new option of allowing the Secretary of State to accept service of process. The Insurance Department is now permitted to charge a reasonable fee for acting as agent for service of process.

2006 State Sessions Raised a Potpourri of Other Issues

● **Waiver of Defenses.** Under **Connecticut** HB 5187, as introduced, a surety would waive all of its defenses to a claim if the surety did not respond to a claim within 90 days either by paying the claim or identifying the portions that are in dispute. SFAA worked with AIA and NASBP on talking points to oppose the bill; and SFAA drafted amendments, in the event that the bill will proceed, to limit the waiver to the surety's defenses based on the notice of the claim. In our proposed amendments, the surety would not have waived any statutory defenses or any defenses of the principal. After negotiations with the sponsor, however, a substitute bill was introduced in which the provision regarding the surety's waiver of defenses was removed. The bill passed and the Governor signed it into law.

● **Statute of Repose.** Contractors in **Florida** sought to decrease the time in which an action can be brought based on the design, planning or construction of an improvement to real property. SB 1940 would shorten the statute of repose from 15 to ten years. SFAA, AIA and the local surety association supported this effort. The bill passed, but has not yet been sent to the Governor for signature.

● **Safety Education. Maine** LD 1628 would have required all employees working on public construction projects in excess of $10,000 to complete a safety-training course. The bill would have allowed the State to cancel a construction contract if untrained workers were on the project. The bill did not directly address surety and the consequences to the surety if a contract were cancelled. The bill is dead for this year.

June State Legislative Report—Recent Enactments in Commercial Surety

The following is a list of laws affecting commercial surety that were enacted into law in May 2006.

ALASKA

HB 392—Public Officials

HB 392 creates regional solid waste management authorities. The Authority must maintain a fidelity bond for its board of directors and each officer responsible for the accounts and finances of the Authority.

ARIZONA

HB 2622—Motor Vehicles

The new law increases from $25,000 to $100,000 the bond for third party providers of motor vehicle registrations and renewals. Arizona permits motor vehicle registration and renewal by phone or Internet through private contractors.

COLORADO

HB 1161—Mortgage Brokers

The new law requires mortgage brokers to maintain a $25,000 bond. As originally drafted, the bill would have required a $100,000 bond or errors & omissions insurance.

HB 1294—Rebuilders Certificate of Title

The new law provides that applicants for a rebuilder's certificate of title to motor vehicle must post a bond or other security if they are unable to prove title to a motor vehicle. The amount of the bond is twice the value of the vehicle.

CONNECTICUT

HB 5846—Homemaker-companion agencies

The new law requires homemaker-companion agencies to be licensed and bonded. The amount of the new bond is not specified in the law. Such agencies provide non-medical supervisory services for the health and safety of individuals in their homes.

SB 391--Home Heating Oil Dealers

The new law expands the application of the existing law for home heating oil dealers to home heating propane gas dealers. The law requires those who enter into prepaid contracts or capped-price-per-gallon contracts to obtain futures contracts for 75% of the amount of oil promised or to post a bond equal to at least 50% of the funds received.

SB 562—Gas Hearth Installers

The new law permits the Commissioner of the Department of Consumer Protection to establish limited contractor and journeyman gas hearth installer licenses. Home service

contractors may not perform gas hearth work after July 1, 2008, without such a license. The Commissioner is given authority to set the terms and conditions of the licensing by regulation.

FLORIDA

HB 841—Appeal Bonds
The new Florida law limits appeal bonds in all civil cases, except class actions, to $50 million, with the amount to be increased annually to reflect changes in the Consumer Price Index. The courts can reduce the amount of the bond in the interest of justice and for good cause shown, except if there is insurance or indemnification in the case. The appellee may engage in discovery to determine if the appellant is dissipating or diverting assets. As originally drafted, the bill included a separate cap for 'small businesses.' The bill would have provided that, if the appellant was an individual or independently owned and operated business with 400 or fewer employees, the appeal bond could not exceed 5% of the appellant's net assets or $1 million in the aggregate.

HB 1207—Public Officials
HB 1207 creates the Indian River Mosquito Control District, which will be operated by three commissioners. Each commissioner will have to post a $5,000 bond.

HB 1245—Public Officials
HB 1245 requires each of the seven members of the governing board of the North Broward Hospital District to post a $5,000 bond.

HB 1361—Public Officials
HB 1361 allows two or more state non-profit corporations to form a self-insurance fund for purposes of spreading the liabilities of its group members for any property-casualty risk or surety insurance. The fund must have annual premiums in excess of $5 million, use a qualified actuary to set rates and loss reserves, and receive at least 75% of its revenues from the local, state or federal government. SFAA opposed this bill.

HB 1413—Public Officials
The new law creates the Argyle Fire District, which would be operated by five commissioners. Each commissioner would have to post a $5,000 bond. The treasurer would have to post a $10,000 bond.

HB 1483—Public Officials
HB 1483 creates the Grove Community District. The board of the district could require the treasurer to post a bond. Bidders on contracts let by the board could also be required to post bonds.

HB 1559—Public Officials
HB 1559 creates the Brevard County Viera Stewardship District. The treasurer of the district must post a bond in an amount and with terms and conditions acceptable to the board of directors.

HB 1629—Public Officials

HB 1629 creates the Gainesville-Alachua County Regional Airport Authority. The secretary-treasurer and other officers and employees of the Authority would have to post surety bonds.

SB 256—Private Schools

SB 256 modifies the requirements for private schools to be eligible to participate in the John M. McKay Scholarship. Currently, private schools must demonstrate fiscal soundness by providing a statement by a certified public accountant confirming that the private school has sufficient capital or credit to operate the school for the upcoming year. In lieu of such a statement, a surety bond or letter of credit for the amount equal to the scholarship funds for any quarter may be filed with the department. The new law requires a surety bond or letter of credit. The statement from a certified public accountant is no longer acceptable.

SB 659—Public Officials

SB 659 creates a new charter for the City of Madison. The officers and employees of the city must post surety or fidelity bonds in such amounts and upon such terms and conditions as the city council requires.

GEORGIA

HB 276—Ignition Interlock Devices

Under the new law, installers of ignition interlock devices must post a $10,000 surety bond for the protection of the contractual rights of individuals. The law provides that the aggregate liability of the surety shall not exceed $20,000 per location and that the surety may write a single bond for all locations separately licensed by the same individual. The bond can be cancelled with 30 days' notice.

HB 1075—Car Dealers

HB 1075 raises the value of the bond required from used car dealers from $20,000 to $35,000.

HB 1477—Public Officials

HB 1477 creates the charter for the City of Darien. The officers and employees of the city must post surety or fidelity bonds in such amounts and upon such terms and conditions as the city council requires. HB 1478 is identical to HB 1477, except it is for the City of Demorest. HB 1559 is identical to HB 1477, except it is for the City of Guyton. HB 1620 is identical to HB 1477, except it is for the City of Lithonia.

HB 1481—Public Officials

HB 1481 creates the Board of Commissioners for Bartow County. The chairman and each commissioner must post a $10,000 bond.

SB 505—Mortgage Brokers

The new law exempts a mortgage broker or mortgage lender from being licensed and bonded if the broker or lender has an exclusive contract with any person that is a wholly-owned subsidiary of a financial holding company or bank holding company, savings bank holding company or thrift holding company, which meets certain requirements including the provision of bonds. Such a company must post the lesser of a $50,000 bond per person or a $1 million bond. Existing law requires individual mortgage brokers to post a $50,000 bond and mortgage lenders to post a $1 million bond.

HAWAII

HB 3250—Appeal Bonds
The new law limits appeal bonds to $25 million regardless of the amount of the judgment. For "small business concerns," as that term is defined in Hawaii law, an appeal bond cannot be more than $1 million.

SB 2143/HB 2973—Money Transmitters
The new law requires money transmitters to post a $1,000 bond or alternate security. The bond could be increased to a maximum value of $500,000 depending on the financial condition of the licensee. Claimants against the licensee, as well as the State, may bring claims against the bond.

IOWA

HB 2786—Lien Release
HB 2786 relates to mortgage foreclosures. The new law permits the plaintiff, or any person guaranteeing the plaintiff's mortgage, to post a bond to release the claim against the property of any person claiming a lien superior to that of the plaintiff in the property. The bond must be in amount of not less that twice the amount of the claim. The claimant has 12 months from the notice of the bond and release to file a claim against the bond, or the claimant is barred from any further remedy. In a successful action on the bond, the court may award reasonable attorneys' fees.

SB 2364—Service of Process
As originally drafted, SB 2364, the Iowa Insurance Department's legislative package, contained a provision to repeal the requirement that the Insurance Commissioner act as agent for service of process for insurers. The Department bill would have caused SFAA members to begin filing an agent for service of process in the Iowa federal district courts. SFAA worked with AIA to craft an amendment that designates the Secretary of State to receive service of process for sureties for purposes of 31 USC 9306, to the extent the surety cannot otherwise be served in Iowa. Insurers otherwise file a resident agent for licensure. At the eleventh hour, the trial lawyers complained about the Department no longer accepting service of process, so the provisions were added back to the Insurance Code in addition to the new option of allowing the Secretary of State to accept service of process. The Insurance Department is now permitted to charge a reasonable fee for acting as agent for service of process.

ILLINOIS

SB 17—Public Officials
SB 17 creates the Southern Illinois Economic Development Authority. The depositories designated by the Authority shall be bonded in an amount equal to the maximum sum expected to be on deposit at any one time.

SB 304—Notary Public
SB 304 increases the amount of the bond required from notaries from $5,000 to $25,000.

KANSAS

SB 253—Advertising Bond
The new law repeals the authority of the state secretary of transportation to require bonding in connection with the license for outdoor advertising.

LOUISIANA

HB 616—Credit Repair Services
HB 616 raises the value of the bond required from credit repair service organizations from $25,000 to $100,000.

MAINE

HB 1493—Home Heating Oil Dealers
HB 1493 requires home heating oil, kerosene or liquefied petroleum gas dealers entering into prepaid heat oil contracts with consumers to have either futures contracts for at least 75% of the heating oil committed to consumers, a surety bond in an amount equal to half the funds paid to the dealer or a letter of credit in an amount not less that 100% of the funds paid to the dealer. The amount of the futures contracts or the surety bond may be reduced when the fuel is delivered.

MISSISSIPPI

SB 2439—Third Party Payment Processors
The new law requires third-party payment processors to post a $50,000 surety bond or other security for each debt management service provider it contracts with, but no more than $150,000.

NEBRASKA

LB 876—Mortgage Brokers
The new law raises the value of the surety bond required from mortgage bankers from $50,000 to $100,000.

OHIO

HB 454—Money Transmitters
A surety bond is one of the types of permitted security that can be posted in connection with licensure as a money transmitter. The surety bond provided can be canceled with 30 days' notice.

OKLAHOMA

SB 806—Body Piercing
SB 806 requires a surety bond in the amount of $100,000 for all body piercing and tattoo operators.

SB 1084—Tobacco Taxes
Under the new law the amount of the bond required for an agent's or wholesaler's license for tobacco products is increased from $1,000 to $25,000. The bond secures payment of State taxes. The new law permits the surety to request to be released from liability to the State and that the release becomes effective 60 days after a written request has been made.

SB 1701—Rebuilder Certificate
The new law requires motor vehicle rebuilders to be licensed and to post a $15,000 bond.

UTAH

SB 79—Debt Management Services
SB 79 requires debt management service providers to post a $100,000 bond or alternate security. The bond has to be issued by a company with a rating of at least 'A.' This bill is based on the new NCCUSL model act, but the value of the bond is higher than in the model legislation.

VERMONT

SB 150—Gas Tax Bond
The new law changes the time from September to November for the annual review and determination of the amount of the gas tax bond.

SB 158—Asset Locators
The new law requires asset locators to post a $10,000 bond.

SB 228--Home Heating Oil Contracts
The new law requires home heating oil, kerosene or liquefied petroleum gas dealers entering into prepaid contracts to post a financial security or maintain futures contracts. If choosing to post a surety bond, the bond would have to be in an amount not less than 50% of the total amount of funds paid to the dealer by consumers pursuant to prepaid heating oil, kerosene or liquefied petroleum gas contracts.

VIRGINIA

HB 812—Appeal Bonds
The new law removes the requirement for an appeal bond from a plaintiff in a civil case where the defendant has not asserted a counterclaim.

HB 1039—Dangerous Dogs
The new law requires owners of dangerous dogs to maintain liability insurance of $100,000. A surety bond may be provided in lieu of insurance.

SB 306—Motor Vehicle Dealers
The new law raises the value of the bond required from motor vehicle dealers from $25,000 to $50,000.

WASHINGTON

SB 6541—Appeal Bonds
The new law limits appeal bonds from master settlement agreement signatories to $100 million.

June State Legislative Report—Recent Enactments in Fidelity Bonds

The following is a list of laws affecting fidelity bonds that were enacted into law in May 2006.

Much of the existing state legislative activity on fidelity comes from requirements for public official bonds. As usual in the state legislative sessions, several states enacted new requirements for public official bonds for newly formed local governments or authorities. Often, the state legislation regarding newly formed local governments, boards, commissions or other entities does not specify the type of bond. For some of the officials and functions now required to be bonded, a fidelity bond may be intended, even if the new law refers to a surety bond. Therefore, SFAA included these types of enactments in its reports on both commercial surety and fidelity.

ALASKA

HB 392—Public Officials
HB 392 creates regional solid waste management authorities. The Authority must maintain a fidelity bond for its board of directors and each officer responsible for the accounts and finances of the Authority.

FLORIDA

HB 1207—Public Officials
HB 1207 creates the Indian River Mosquito Control District, which will be operated by three commissioners. Each commissioner will have to post a $5,000 bond.

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HB 1245 requires each of the seven members of the governing board of the North Broward Hospital District to post a $5,000 bond.

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HB 1629 creates the Gainesville-Alachua County Regional Airport Authority. The secretary-treasurer and other officers and employees of the Authority would have to post surety bonds.

GEORGIA

HB 1477—Public Officials
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HB 1481—Public Officials
HB 1481 creates the Board of Commissioners for Bartow County. The chairman and each commissioner must post a $10,000 bond.

ILLINOIS

SB 17—Public Officials
SB 17 creates the Southern Illinois Economic Development Authority. The depositories designated by the Authority shall be bonded in an amount equal to the maximum sum expected to be on deposit at any one time.