

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee

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

DATE: June 30, 2006

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

CONNECTICUT

SB 5695: *UConn 2000* - Effective date is October 1, 2006.

UConn 2000 is a \$2.3 billion, 20-year state project to rebuild and enhance the University of Connecticut. Public Act 95-230 created UConn and exempted it from certain local laws and environmental regulations. In 2005, legislation was enacted exempting the UConn 2000 construction project from the state law provisions prohibiting OCIPs. The new law in 2006 contains several new provisions to provide independent oversight of UConn 2000 construction projects, including board of trustee audits and an independent committee to review construction policies and procedures. The new law subjects UConn 2000 projects to public building construction requirements, requires public bidding on projects over \$500,000 and requires compliance with the state building code, among other provisions.

HAWAII

HB 2966: *Public and Low Income Housing* - Effective July 1, 2006.

HB 2966 divides the Housing and Community Development Corporation of Hawaii into two separate agencies, the Hawaii Housing and Finance Corporation, "Corporation," and the Hawaii Public Housing Authority, "Authority." Under the new law, the Hawaii Public Housing Authority handles the administration of low-income and public housing projects. The Hawaii Housing and Finance Corporation handles the actual construction of public housing projects. The Corporation may develop housing projects privately through a competitive bidding process with public notice given. The successful bidder is required to furnish a payment bond and a performance bond. Under the contract, the

Corporation maintains control of the project until it is available for occupancy. Also, the new law allows for the Corporation to develop housing projects on its own or to enter an agreement with an independent developer. The developer must furnish a performance bond to the Corporation, conditioned on completion of the project on time, with sureties acceptable to the Corporation.

LOUISIANA - All legislation becomes effective August 15, 2006, unless specified.

SB 151: Small Business Contracts

SB 151 creates a program for acquiring data processing equipment and software and sets goals for small businesses to participate. The Commissioner of Administration determines the goal for awarding small businesses a portion of the contracts for these procurements under the new provision. The new section of the law defines a small business as fifty employees or less for this program. Even if the goals of the program are not met, small businesses may still participate in the normal bidding process. The Commissioner will establish the contracting procedure, and surety bonds guaranteed by the federal Small Business Administration are acceptable as security for an award under this program.

SB 383: Surety Definition

SB 383 amends the Uniform Commercial Code with several general revisions. Among them a surety has been further defined to include any "other secondary obligor" in addition to the existing definition as a guarantor.

S Res. 158: Study on Individual Surety for Public Works Projects

S Res. 158 is requesting the Senate Committee on Transportation, Highways and Public Works to conduct a study on the feasibility of permitting individual surety on bonds required for public works contracts. In Louisiana, apparently small businesses have been able to easily secure bonding for federal projects under the Federal Individual Surety Program, but the current laws in Louisiana contain restrictions that make it difficult or even prohibit these small businesses from obtaining individual surety for state projects. The current law has no alternative to the conventional bonding market and small or growing Louisiana businesses are losing out on bids and contract awards from the state. They have asked the committee to report on this study's results and any proposed legislation by March 15th, 2007.

SOUTH CAROLINA

SB 572: Bid Security - Effective immediately.

SB 572 has amended the existing law regarding bid security for construction contracts. Under the old law, bid security was required for construction contracts in excess of \$100,000. That amount has been lowered to \$50,000. The amount for the waiver of bid security has been amended, lowering the amount from \$100,000 or less to \$50,000 or less.

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 June 2006.

ARIZONA

SB 1276: *Wine Shipment and Production* - Effective date is September 22, 2006.

SB1276 requires domestic farm wineries to file a bond if they are producing 20,000 bottles or less within a calendar year and making deliveries or sales by telephone, mail, fax or catalogue, through the Internet or by other means. The law was amended to meet the standards set forth in the 2005 U.S. Supreme Court ruling in *Granholm v. Heald*, which now allows small wineries to ship its product out of state. In Arizona, the State has chosen to require a bond for small domestic farm wineries, conditioned on the payment of all taxes, penalties and any other obligations under the law. The Department of Liquor Licenses and Control fixes the amount of the bond required of the domestic farm winery and may increase or decrease the amount at any time. The bonds must be equivalent to two times the winery's estimated monthly tax and the total amount for the bonds may not be less than \$500. A domestic farm winery is exempt from the requirements if it made its payments on time for any taxes required by the existing law for twelve consecutive months immediately preceding the current month.

CALIFORNIA

SB 201: *Lease Termination* - Effective Date is January 1, 2007.

SB 201 requires a form of financial assurance upon the termination of a lease for a marine finfish aquaculture. Existing law requires that upon termination of the lease, all structures must be removed at the lessee's expense, to the satisfaction of the Fish and Game Commission, or the State will remove the remaining structures at the lessee's expense. Under the new law, a surety bond is one of the forms of assurance accepted by the Commission to ensure the satisfaction of the lease requirements.

CONNECTICUT

SB 57: *Enforcement of Child Support* - Effective date is October 1, 2006.

Under existing law, state courts may order persons responsible for paying child support to post a bond to assure that they will appear in court and make such payments on time. The bond is forfeited if they fail to meet these obligations. The new law amends the child support provisions to distribute the bond amounts according to the distribution formula under the federal welfare law. Previously, the proceeds of the bond went to the custodial parent, or to the State if the family had received state assistance.

FLORIDA

HB 7079: *Mobile Home and RV Dealers* - Effective date is October 1, 2006.

HB 7079 amends the existing law regarding the protection trust fund for mobile home and recreational vehicle dealers or brokers. The new law clarifies the provisions for claims that can be made against the trust fund when a claim cannot be made against the surety, the dealer or the broker. The new law provides that the claimant may seek recovery from the trust fund when the dealer or the broker is pending a bankruptcy proceeding and the claimant has filed a claim in that proceeding, or the dealer or broker cannot be found in the State or the business has closed. The new law also revises the provisions for claims against the surety, allowing the claimant to seek recovery from the trust fund when a claimant's lawsuit against the surety was stayed or discharged in the surety's current bankruptcy proceeding or if a lawsuit against the surety is prohibited due to its pending bankruptcy claim. Provisions also have been made in the new law so that the claimant may seek recovery from the trust fund when the surety is found not to be liable due to prior payment of valid claims against the bond in an amount equal to, or greater than, the face amount of the applicable bond. A claim cannot be made against the trust fund if the claimant has recovered an amount that is greater than or equal to the total amount of the loss, from the surety under the revised provisions of the new law. The new law also provides that the \$25,000 payment ceiling per mobile home or recreational vehicle from the trust fund now includes any payments received from a claim against the surety bond or any expenses, including attorney's fees.

SB 1170: *Trust Code* - Effective date is July 1, 2007.

SB 1170 creates new sections in the Florida Trust Code. A new section provides that a trustee is only required to furnish a bond to secure the performance of his or her duties when the court decides it is necessary to protect the interests of the beneficiaries. The bond also may be required if it is in the terms of the trust and the court has not dispensed with this requirement. The court has the authority to determine the amount of the bond and the terms of the trustee's liability. Also, the court may modify or terminate the bond at any time. Even if the trustee resigns, any liability of the trustee or of the sureties on the bond for the acts and omissions of the trustee is not discharged or affected by the trustee's resignation.

HAWAII

HB 2315/SB 2278: *Financial Institutions* - Effective date is January 1, 2007.

HB 2315 amends the existing law regarding the preliminary application to become a financial institution in Hawaii. Three or more people who are residents of the State, or any company, that apply for a license as a financial holding institution in Hawaii, must submit evidence of an application for a fidelity bond and other forms of insurance from U.S. licensed insurance companies in the license application. The existing law also has been amended to require evidence that federal deposit insurance, a fidelity bond and other forms of insurance, as now required in the preliminary application, have been or will be obtained and will be in effect before opening for business.

LOUISIANA - All legislation becomes effective August 15, 2006, unless specified.

HB 1137: *Telemarketers*

HB 1137 deletes the terms “shall also be required” from existing law and replaces the phrase with the word “may.” The new law now states that telemarketers “may” maintain a surety bond in the amount of \$20,000, in addition to the existing requirements for registration and payment of the necessary fees in order to obtain a copy of Louisiana’s “do not call” list. The bond that telemarketers may maintain is for guaranteeing the payment of any administrative penalties for violation of the do not call requirements. There is no explanation in the amendment as to what the telemarketer must do if it chooses not to post the bond.

HB 1377: *Used Motor Vehicle and Recreational Product Dealers*

HB 1377 requires registered used motor vehicle dealers to be licensed and to post a bond of \$20,000, which is used for penalties and hearing costs regarding proper licenses, tags and titles. The bond indemnifies anyone who suffers a related loss due to failures to comply with the laws regarding sales tax, licenses, tags, or titles, any person who suffers any loss, damages, and expenses due to failure to deliver title, and any failure to pay all taxes, licenses, and registration fees. The term of the bond is for the period of the license and a new bond or a continuation certificate must be given at the beginning of the next license period. The total sum of the liability to the surety is not to go over the penal sum of the bond in any one year. If the bond is cancelled at any time during the license period, the license will be revoked upon the date of the cancellation, unless a new bond is given before that date. The same bond is required for those who sell recreational products and it is subject to the same conditions. In any action regarding marine dealers, either party may file an appeal to the Louisiana Recreational and Used Motor Vehicle Commission’s decision, as long as a surety bond is posted to compensate the prevailing party for compliance with the Commission’s decision.

HB 1384: *Public Adjuster*

HB 1384 requires public adjusters to be licensed and to post a surety bond or an irrevocable letter of credit in a minimum amount of \$50,000 as evidence of financial responsibility. The bond cannot be terminated without 30 days prior written notice to the Commissioner of Insurance.

SB 266: *Tax Stamp Waivers for Tobacco Dealers - Effective Immediately.*

SB 266 amends the existing law by deleting the prohibition of tobacco dealers who buy tax stamps on credit from applying for a waiver of the required bond. The law’s existing waiver application procedures remain in place for those in good standing and also for those found delinquent in their tax payments.

SB 383: *Surety Definition*

SB 383 amends the Uniform Commercial Code with several general revisions. Among them a surety has been further defined to include any “other secondary obligor” in addition to the existing definition as a guarantor.

SB 578: *Investment Advisers* - Effective Immediately.

SB 578 amends existing law by inserting the phrase “investment adviser representative,” to be included in an exemption, already provided for an investment adviser and a principal, from posting the license bond required for dealers in the securities industry. However, investment advisers, principals, and now investment adviser representatives, must follow the same license application procedures required for dealers, without the requirement of a bond, as provided by existing law.

SB 645/HB 514: *Public Official*

SB 645 designates the "clerk of court" as parish recorder for Orleans parish, and gives the recorder authority over the parish's notaries public and their surety bonds. Each must be listed in the notary's report with the expiration date, the names and the addresses of the sureties on the bond. The parish recorder must keep track of all the bonds and their expiration dates and has the authority and discretion to test the adequacy of the sureties on the bond through the district court for all notaries required to furnish one. The new law does not change the requirements for bonding for notaries.

SB 647/HB 656: *Public Official* - Effective upon approval of a state constitutional amendment by election on November 7, 2006.

SB 647 amends the law for parish assessors to consolidate the board of assessors for Orleans parish into a single official and subject him or her to the existing requirements of the laws governing this official in all of the other Louisiana parishes. The surety bond required for a parish assessor under existing law is \$3,000 per representative in the state legislature from the parish, limited to a total amount of \$10,000. The new law now requires the new assessor for Orleans parish to post this bond. Multiple sureties may be used, at a minimum amount of \$200 each, but must total the required amount. Additionally, under the old law, each member of the board of assessors in Orleans parish was required to post a surety bond of \$5,000 to the State. This bond also is required of the single assessor for Orleans parish under the new law, but he or she is only required to post one bond for \$5,000. Multiple sureties also may be used, at a minimum amount of \$500, so long as the total meets the required \$5,000.

MARYLAND

HB 1620/SB 974: *Lease Agreements* - Effective immediately.

HB 1620/SB 974 amends the existing law regarding security deposits by adding a new option for the tenant to purchase a surety bond in lieu of the security deposit. The tenant also may purchase the bond in addition to giving a security deposit. This new law contains several provisions governing the terms and requirements of the surety bond, which specifically outline the rights of the tenant and the landlord:

The landlord is prohibited from requiring a surety bond in lieu of the security deposit, but also is not required to consent to a tenant's purchase of a surety bond. The surety bond protects the landlord from nonpayment of rent, damages due to breach of lease, and

any excessive damages by the tenant or the tenant's family, guests, or employees, etc. to the leased property and anything belonging to it. The surety bond may be used to pay the landlord's claim for these damages, however, in the case of a breach of lease, only the actual amount of damages caused by the breach is owed. The surety bond does not represent the amount of liquidated damages from a breach of lease. Under the new law, as with the existing law for security deposits, the surety bond may not be in excess of two months rent per dwelling unit. If both a bond and a deposit are given, the same rule applies. In any case of an excessive amount charged, the tenant has the right to recover up to three times the extra amount charged and reasonable attorney's fees. The tenant also has the right to be informed in writing that payment for the surety bond is non-refundable. If the landlord does not accept the bond after its purchase, or if the tenant does not enter into the lease, the premium and any other charges for the bond are to be returned to the tenant. Also, the tenant must be informed that the surety bond is protection for the landlord and the tenant is still responsible for all unpaid rent and all damages.

Even though the tenant may have purchased a surety bond, he or she retains the right to make direct payments to the landlord or to require the use of any security deposit paid before the landlord may make a claim against the surety. If the landlord accepts this payment and it fully satisfies the amount of the damages, then the landlord forfeits the right to any claim against the surety that the tenant's payment or any amount that was deducted from the security deposit has covered. The surety itself may not make any direct or indirect payments to the landlord, except as specified in the new law. Before a landlord may make a claim against the surety, the landlord must mail the tenant a written notice of damages ten days before doing so and the tenant has ten days from receiving it to make any disputes of the damages listed. If the claim is disputed, the surety may not report it to a credit-reporting agency until a judgment is issued. Existing laws for the security deposit regarding inspection of the premises and required notices also apply to the surety bond.

In claims brought against the tenant by the surety, the tenant has all rights and defenses he or she would have against a landlord's claim and the tenant is only liable for damages that he or she would have had to pay the landlord. Should the landlord's interest in the leased property be sold or transferred, the new landlord must accept the tenant's surety bond and security deposit and may not require an additional security deposit during the current lease term. Also, at any lease renewal, the new landlord may not require a surety bond or security deposit in addition to an existing bond or deposit that would total an amount greater than two months rent per unit or the new landlord is subject to the same penalties for charging an excessive amount. If a surety makes a claim against a tenant without a reasonable basis, then the court may award the tenant up to three times the amount claimed, plus reasonable attorney's fees. A lease agreement may not waive any provision of the new law.

MICHIGAN

HB 5324: *Money Transmissions* - Effective immediately.

HB 5324 amends the existing laws for consumer financial services to conform to a new law enacted by HB 5328, the Money Transmission Services Act. HB 5324 amends the existing surety bond requirements by making them subject to the requirements of the Money Transmission Services Act in addition to the other existing laws concerning consumer financial services and financial institutions. The Money Transmission Services Act (HB 5328) contains additional requirements for the amount of the bond and all other licenses remain subject to the existing \$500,000 for the minimum bond amount set in the existing law. In addition, HB 5324 also provides for the inclusion of money transmission services in the existing procedures for making claims against the bond, any criminal acts of the licensee, and risks of financial losses caused by the licensee.

HB 5328: *Money Transmission Services Act* - Effective immediately.

HB 5328 requires money transmission services to post a bond of at least \$500,000 up to a maximum amount of \$1,500,000 in connection with licensure. The total liability for the bond is not to exceed the maximum amount. The Commissioner of the Office of Financial and Insurance Services determines the amount of the bond based on the number of locations where the applicant will provide these services and/or the number of delegates performing these services in the State for the applicant. The applicant must have a net worth over \$100,000 to obtain a license. If the applicant will have any other locations or delegates, an additional \$25,000 in net worth is required per location or authorized delegate, up to \$1,000,000, whichever amount is lower.

MINNESOTA

SB 2743/HB 3110: *Voting Systems* - Effective immediately.

Current law in Minnesota requires a vendor of voting systems to provide a \$5,000 vendor bond, along with a certification that the equipment for sale is in accordance with Minnesota election laws. It also requires a performance bond to guarantee that any electronic voting systems provided work properly and that any related election services are in accordance with the State's election laws. Under SB 2743, if after a canvass of the voting precincts and the State, the error for the election results is greater than one half of one percent for the canvass of the precincts and/or the State and it is a proven result of the electronic voting machine or the vendor, then the vendor must forfeit the vendor bond and the performance bond required under the existing law.

HB 4162: *Omnibus Bill: Boxing Promoters* - Effective immediately.

HB 4162 requires boxing promoters and others in the professional boxing industry to be licensed. The new law only requires boxing promoters to deposit a cash bond or a surety bond in an amount to be determined by the State Boxing Commission before a promoter may obtain a license. The bond is conditioned on the promoter's compliance with the requirements of the law and any rules adopted under it concerning the performance of his or her duties.

NEW HAMPSHIRE

HB 1126: *Mortgage Bankers* - Effective date is August 18, 2006.

HB 1126 amends the existing law by requiring mortgage bankers to post a continuous surety bond for \$20,000 to maintain a license in New Hampshire.

SB 391: *Insurance Administrators* - Effective date is August 8, 2006.

SB 391 amends the existing law regarding the bonding of insurance administrators. Prior law did not require administrators to maintain a bond when their business was restricted to benefit plans fully insured by authorized insurers or legitimate employee benefit plans that an employer or an employee organization, or both, had established. The Employee Security Income Act of 1974 preempted New Hampshire insurance laws for those plans. Under the new law, a bond is required for licensed administrators or license applicants, when they administer benefit plans that are fully insured by an insurer not licensed in New Hampshire, or by multiple welfare arrangements, or for any church self-insured plans. The bond must cover persons and individuals in New Hampshire who have paid premiums, insurance charges or any other type of payment to the administrator's business. The bond must be in the amount of \$100,000 or 10% of the daily client account balance in the previous calendar year and cannot exceed \$1,000,000. In the event a bond cannot be obtained, the law provides for other securities to be posted as long as they guarantee the same amount required for the bond.

SB 394: *Trust Companies* - Effective date is August 19, 2006.

SB 394 enacts the Trust Modernization and Competitiveness Act. Under the new law, a trust company must post securities or a surety bond to defray costs in the event of the company's failure. The Bank Commissioner determines the amount of the bond, but it cannot be more than \$1,000,000. Should the company go into receivership, the bond may be reduced to cash to defray the costs of the process and is paid out by the Commissioner. The surety bond must be issued by a commissioner-approved and state licensed surety company with one of the three highest ratings by a national rating service.

SOUTH CAROLINA

HB 4532/SB 1034: *Automobile Dealers and Wholesalers* - Effective immediately.

HB 4532 increases the amount of a surety bond required for an applicant for a license as automobile dealers or wholesalers from \$15,000 to \$30,000. The new law also increases the limit of the total liability of the surety for the amount of the actual loss incurred to \$30,000, raised from the \$15,000 limit set in existing law for each bond.

SB 991: *Trust Funds* - Effective immediately.

SB 991 amends the existing law which required that funds held in the trust department of a bank or a trust company that are either awaiting investment or distribution must be secured by bonds. The new law allows these funds to be secured by additional methods such as collateral and irrevocable letters of credit, as long as the method of assurance meets all criteria of the State Treasurer for securing public funds.

SB 1287: *Driver Training Schools* - Effective date is January 1, 2007.

SB 1287 has amended the existing law to require a surety bond for driver training schools in the amount of \$10,000 from a state licensed corporate surety in addition to the existing \$50 license application fee. The new bond serves as indemnification for any loss or damage suffered by a person who has retained the licensed school's services. The bond also must be conditioned on compliance with the licensing laws for driver training schools.

TENNESSEE

HB 139/SB 413: *Landfills* - Effective date is July 1, 2007.

HB139 amends the allowable procedures for forfeiture of performance bonds. Existing law provides that the Solid Waste Disposal Control Board will specify the terms of the bond in regulations. Under the new law, when the parties agree to it, the terms may require immediate payment to the Department of Environment and Conservation in lieu of any formal forfeiture procedure. The other regulations and requirements of the performance bond remain in place, as well as the other acceptable forms of assurance.

June State Legislative Report—Recent Enactments in Fidelity

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

OHIO

SB 185: *Title Insurance Agents* - Effective date is January 1, 2007.

SB 185 deletes the requirement of a "fidelity bond" for title insurance agents and replaces it with two separate requirements. The first, for all title insurance agents or agencies that handle escrow in real property not involving the issuance of title insurance, requires "coverage that protects the parties...against theft, misappropriation, fraud, or any other failure to properly disburse settlement, closing, or escrow funds." (Sec. 2953.23(C)) The second, for every title insurance agent or agency and any subcontractors, requires an errors and omissions policy.

LOUISIANA - All legislation becomes effective August 15, 2006, unless specified.

HB 436: *Commercial Carriers*

HB 436 enacts a new section in the law regarding commercial carriers of public funds. A fidelity bond in the amount of \$100,000 is required for any carrier that transports public funds. The bond is to cover each officer, director, manager, managing participant, agent and employee, paid or unpaid, before they start employment. The commercial carrier may have an individual bond on each person, a schedule fidelity bond, or a blanket bond to cover everyone. The bond is to protect against theft, misappropriation, dishonesty, fraud, defalcation, forgery or any other similar insurable losses caused by the commercial carrier.

SB 383: *Surety Definition*

SB 383 amends the Uniform Commercial Code with several general revisions. Among them a surety has been further defined to include any “other secondary obligor” in addition to the existing definition as a guarantor.