

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee

FROM: Daniel Wanke
Associate Analyst, Government and Regulatory Affairs

RE: November State Legislative Report—Recent Legislation and Enactments in Contract Surety

DATE: December 12, 2006

The following is a list of laws affecting contract surety that were introduced or enacted into law in November 2006. SFAA also is now tracking new introductions, drafts, and pre-filed bills in order to prepare for 2007, and those are included in this report as well. SFAA's positions are indicated by (-) for opposing/opposed, (=) for neutral and (+) for supporting/supported.

MASSACHUSETTS

(=) **HB 5344: *Home Service Contract Providers*** **INTRODUCED**

HB 5344 would enact new law requiring home service contract providers (providers) to provide financial assurance for the faithful performance of the provider's obligations to its contract holders. A surety bond may be used as one method to secure performance. The bond must have a minimum value of 5% of the gross consideration received, less claims paid, on the sale of all service contracts issued and in force. The security also must be not less than \$25,000. In addition to a surety bond, security may be in the form of securities, cash, a letter of credit, or another form of security prescribed by regulations issued by the Insurance Commissioner. A provider also may obtain an insurance policy, maintain a reserve fund, or submit financial statements as evidence of adequate financial net worth in lieu of any of the other forms of security.

NEW JERSEY

(-) **HB 3649: *Retainage*** **INTRODUCED**

HB 3649 would enact new law by creating a partial payment schedule, and would create retainage requirements for roadway construction and maintenance contracts with the New Jersey Turnpike Authority (Authority). The bill would require that contracts into which the Authority enters provide for partial payments at least once each month or from time to time as the work progresses. Also, the bill would require that 2% of the amount due on partial payments of the total contract price be withheld from the contractor pending completion of the contract. Upon "substantial completion of the contract," as defined by the Authority's rules or regulations, 1% of a payment would be withheld. The Authority also would be able to withhold 4% percent of the payment if work is not progressing according to the standards contained in New Jersey Turnpike Authority Standard

Specifications at any time during performance of the work. Retainage could not be withheld on service contracts including, but not limited to, mowing, sweeping, tree trimming, and similar contracts. The bill also would provide that if any contract provides that a portion of the work could be deferred with the Authority's approval, the sum withheld from the contractor could not be less than 25% of the value of the work. After substantial completion of the contract, any partial payments only would be made if the general contractor has certified to the Authority that all subcontractors have been paid in the same proportion that he or she has been paid. However, if a general contractor and a subcontractor were in dispute over the amount owed, the Authority could advance the amount in dispute to the general contractor after the Authority makes a determination.

HB 3649 applies the same retainage standards that apply to Department of Transportation (DOT) highway contractors under R.S. 27:7-34 to New Jersey Turnpike Authority roadway contractors. The retainage standards for the DOT were amended with the enactment of SB 2864 in 2005, which became effective on January 12, 2006. The prior law for DOT contracts provided that 5% was withheld from the partial payments due on the first 50% of the total contract price. No further percentages were to be withheld until the project reached substantial completion, as defined by the DOT in regulations, at which point 2% was withheld. The DOT law now has the same requirements as would be enacted under HB 3649 described above. The existing DOT law also contained the prohibition on retainage for service contracts, the 25% withholding on deferred portions of work, and the provisions concerning a dispute in the amount owed to a subcontractor.

The following is a list of laws affecting commercial surety that were introduced or enacted into law in November 2006. SFAA also is now tracking new introductions, drafts, and pre-filed bills in order to prepare for 2007, and those are included in this report as well. SFAA's positions are indicated by (-) for opposing/opposed, (=) for neutral and (+) for supporting/supported.

ILLINOIS

(+) HB 5856/SB 821: *Depository Bonds*

To Governor

HB 5856/SB 821 would establish the Riverdale Development Authority (Authority) for facilitating and promoting property redevelopment. Annually, the Authority would be required to designate a state or national bank within the State as its depository. The depository would be required to post a surety bond that is at least equal to the maximum sum expected to be on deposit at any time, conditioned for the safekeeping and prompt repayment of the deposits. Also, the Authority's treasurer and the sureties on his or her official bond would be exempted from liability for the loss of any of the deposited funds due to the depository's bankruptcy, default, failure, or any other act. Collateral also could be assigned to the Authority so long as it would be conditioned in the same manner as existing law permits assignments of collateral to secure the deposits of any city. SB 821 was sent to the Governor on November 30, 2006, while HB 5856, which is identical to SB 821, remains in committee.

MAINE

(=) *Workers Compensation Self-Insurers*

PRE-FILED

The Department of Insurance (Department) in Maine has issued a 2007 proposal that would require amounts collected from a surety bond or drawn upon a letter of credit held as security for a workers' compensation self-insurance program to be held and disbursed in a manner similar to a cash deposit. Existing law provides that employers may furnish proof to the Department of their financial ability to pay the compensation and benefits by posting cash, satisfactory securities, an irrevocable standby letter of credit or a surety bond, in a sum determined by the Department. The surety bond, if selected, runs to the Treasurer of State and is conditioned upon the faithful performance of the requirements in the law relating to the payment of compensation and benefits to any injured employee.

MICHIGAN

(-) *SB 1418, 1420, and 1421: Scrap Tire Collection Site Bond – Effective Immediately*

SB 1418, 1420, and 1421, as passed in the Senate, collectively would amend the existing bond requirement for scrap tire collection sites. The definition of a "collection site" would be changed to include tire chips so that the law would cover any portion of a tire that was stored. Existing law requires the owner of a collection site to maintain a performance bond in the amount of at least \$25,000 per quarter acre of the outdoor tire storage area, and \$2.00 per square foot of tire storage area in a building. If the collection site has fewer than 2,500 tires, then the bond must not exceed \$2,500. There is an exemption from the bond requirement if the owner of the collection site has been in compliance with all the requirements for the site for one year and the site contains no more than the sum of the highest number of scrap tires accumulated at the site during the previous year, plus 10% of the amount of scrap tires that were removed to an end user during the previous year. The bills instead would apply this exemption to a collection site if at least 75% of the commodity, by weight or volume, stored at the site during each calendar year were recycled or used for resource recovery during that year. This would make the exemption consistent with another existing exemption to the bond requirement for collection site in which the tire chips are no larger than two inches by two inches and 75% of such tires stored are removed to a market during the year. The bills would retain that exemption as well, modifying it with a change in the definition of the site to a "commodity storage site" to distinguish such sites.

MONTANA

(=) *LD 145: Truancy Bonds*

DRAFT/REQUEST

LD 145 would eliminate an existing bonding provision for the parents of truant children. The existing law provides that if an attendance officer discovers a child has not been enrolled in a school or excused from attending, the parent or other person responsible for the care of the child must be notified, and if the absence continues, such persons must be notified that they will be prosecuted, unless the child is enrolled or excused within two days of receiving the notice. If these persons are convicted, a fine of \$5 to \$20 is imposed, or a \$100 a surety bond may be posted, conditioned on enrollment of the child within two days after posting the bond. Failure to pay the fine or post the bond results in a jail sentence of at least ten days and no more than 30 days. Instead of the current system of fines and the option of a surety bond, conviction, after the enactment of LD 145, would result in increased fines or jail time for multiple convictions.

(+) LD 229 and LD 919: *Carbon Sequestration*

DRAFT/REQUEST

LD 229 would establish procedures for “carbon sequestration,” in which carbon dioxide is removed from the atmosphere and converted into solid substances. The bill would establish a leasing and a licensing system for performing this process and provisions for providing “ecosystem services,” which are services that natural ecosystems provide, such as carbon sequestration, open space, air and water filtration, biodiversity, wildlife habitat, soil stabilization, and aesthetics. The bill would allow the Board of Land Commissioners (Board) to issue licenses and leases on state lands for a term of up to 99 years for the purposes of carbon sequestration or ecosystem services. The Board could require an application fee, a bid bond, or a payment bond, or any combination of the three from an applicant for a license or lease. Also, at any time prior to the execution and delivery of a carbon sequestration or other ecosystem services license or lease, or at any time during the life of the lease, the Board could require a lessee to file a bond to protect the rights of the State. The Board also would have the authority to prescribe the amount and form of the bond, and could require new or additional bonds at any time, if the previously filed bond would not protect the interests of the State adequately.

LD 919 would permit the Board of Environmental Review to adopt rules to address the furnishing and updating of a reasonable bond, with good and sufficient surety, conditioned for performance of the duty to comply with the proposed law and rules adopted by the Board. This bill also would provide that the bond would have to be sufficient to guarantee the permanent effectiveness of the carbon dioxide sequestration well and cover costs to offset carbon dioxide emissions because of any failure of a carbon dioxide sequestration well to contain carbon dioxide. The well would inject the carbon dioxide into geologic formations for permanent storage.

SFAA supports new bonding requirements, but will approach the sponsor of this bill when introduced to discuss the terms of this proposed bond as the bill draft requires the surety to guarantee the permanent effectiveness of carbon sequestration, over a potentially long period of time, rather than that the principal will comply with the terms of the license or lease. It would be difficult for a surety to guarantee the process, which may not be effective for reasons beyond the control of the principal.

(+) LD 264: *Residential Mortgage Lender Licensing Act*

DRAFT/REQUEST

LD 264 would enact new law, which would require certain residential mortgage lenders to obtain a license and post a bond. The bond would have to be maintained continuously, and would be used for the recovery of expenses, fines, and fees levied by the Department of Administration (Department) for losses or damages incurred by borrowers or consumers as the result of a licensee's noncompliance with the law. The surety bond, in an amount that would be determined by regulations, would have to be payable to the Department and issued by an insurance company licensed in the State. If either the surety or the licensee were to cancel the bond, the licensee would be responsible for informing the Department in writing by certified mail, and would have to provide a new surety bond. The surety bond only could be cancelled if 30 days notice is provided. The license

would be suspended automatically if the licensee does not supply a new surety bond acceptable to the Department by the date of the cancellation.

(=) LD 267: *Mortgage Broker Bond*

DRAFT/REQUEST

LD 267, as drafted, would amend existing law, which requires mortgage brokers to obtain a license and to post either an irrevocable letter of credit or a surety bond in the amount of \$25,000, providing coverage for each location identified in the license application. The law would be amended to clarify that the bond would cover the mortgage broker's principal business location and each branch office. The existing law states that each licensee maintain the bond or letter of credit at all times. As drafted, the existing law would be amended to provide a clarification that exempts all of the mortgage broker's employees from the bond requirement instead of only loan originators.

(=) LD 402: *Textbook Dealer Bonds*

DRAFT/REQUEST

LD 402 would amend existing law that requires textbook dealers to obtain a license and post a bond in the amount of at least \$2,000, and no more than \$10,000 in order to sell textbooks to the Superintendent of Public Instruction. The bill would delete the requirement that the Attorney General must approve the bond.

(-) LD 499: *Worker's Compensation Self-Insurers*

DRAFT/REQUEST

LD 499 would amend existing law concerning the security deposit required from employers that self-insure for worker's compensation and participate in the self-insurers guaranty fund. Existing law provides that the security deposit may be a surety bond, government bond, certificate of deposit, or a letter of credit approved by the Department of Labor and Industry (Department) and the Montana self-insurers guaranty fund. Also, under existing law, for the first three years of operating as a self-insured employer, the employer's security deposit must be in the amount of \$250,000; or an average of the workers' compensation liabilities incurred by the employer in Montana for the first three of the last four completed calendar years, whichever is greater. The draft bill would require that payment would have to be made from any security deposit within 30 days of a demand by the Department. If payment were not made within 30 days by the obligor on the security deposit, the obligor would be liable to the Department for interest at the annual rate of 10 percent on the amount unpaid.

NEW JERSEY

(+) HB 3707: *Tobacco Wholesalers and Distributors*

INTRODUCED

HB 3707 is identical to SB 2276 and SB 2126, which would require tobacco distributors selling tobacco products at two or more places to obtain a separate license for each place of business and file a surety bond in the amount of at least \$6,000, to run concurrently with the license period. The bond would have to guarantee the proper performance of duties and discharge of liabilities.

(+) SB 43: *Public Official Bond*

INTRODUCED

SB 43 would require the secretary of a regional school district to post a surety bond. Determination of the amount of the bond would be guided by a schedule of minimum limits that the State Board of Education promulgates. Also, existing law already requires

the secretary of a board of education to post a surety bond in the amount of at least \$2,000, conditioned on the faithful performance of duties of his or her office. The law concerning this secretary would be amended to provide that the board would determine the amount of the bond in the same manner described above for regional school district boards. The existing law also would be amended such that the secretary would not have to post an additional surety bond if he or she is an officer of the municipality, which constitutes the district, if the bond he or she has given guaranteeing the faithful performance of his or her municipal duties also covers and secures the faithful performance of his or her duties as secretary. A certificate of coverage with sufficient amounts for both the municipal and the board position would have to be certified to the board of education for the district.

OHIO

(+) SB 399: *Public Adjusters*

INTRODUCED

SB 399, based on the NAIC Model Public Adjuster Act, would require public adjusters to be licensed and submit evidence of financial responsibility through a surety bond or an irrevocable letter of credit, which would have to be in the amount of at least \$20,000. The surety bond would have to be in a form approved by the Insurance Superintendent and issued by an insurer licensed in the State. The Superintendent would be authorized under the bond to recover on behalf of any person in the State who sustained damages resulting from the erroneous acts, failure to act, conviction of fraud, or conviction of unfair practices of the public adjuster when acting in his or her official capacity. The bond is cancellable with 30 days written notice to the Superintendent and the licensee. The bill was reported from committee on December 19, 2006, but has not come to a floor vote yet. As this bill follows the NAIC Model Public Adjuster Act, SFAA supports the bond requirement.

SOUTH CAROLINA

(=) SB 41: *Taxi License Bond*

PRE-FILED

SB 41, pre-filed for 2007, would amend the existing law, which requires a taxi owner to obtain either an insurance policy or post a surety bond in an amount not less than \$5,000 for personal injury and an amount not less than \$1,000 for property damage in any one accident. The bill would provide an increase in the amount of the bond or policy to \$25,000 for bodily injury to one person in any one accident; \$50,000 for bodily injury to two or more persons in any one accident; and \$25,000 for injury or destruction of property of others in any one accident. The bill also would provide that the owner, if he or she qualifies under existing law, may become a self-insurer and issue certificates of insurance, so long as he or she meets the financial requirements of a minimum net worth of \$20 million, or provide a segregated self-insured claims account with a sum of \$3,000 for each vehicle to be covered under the self-insurer's certificate.

VIRGINIA

(=) HB 1646: *Motor Carrier Financial Responsibility*

PRE-FILED

HB 1646, pre-filed for 2007, would amend existing law regarding motor carrier bonds. The law currently requires a motor carrier to obtain an insurance policy, post a surety bond, provide a certificate of insurance certifying the coverage of the policy or bond or

obtain a letter of credit. A motor carrier is required under existing law to keep insurance or a surety bond or bonds in force at all times. The minimum amount of financial responsibility required for a motor carrier operating intrastate currently is based on the number of passengers that a vehicle is designed to transport, including the driver. The amounts are as follows: one to six passengers - \$350,000; seven to 15 passengers - \$1,500,000; and 16 or more passengers - \$5,000,000. Instead, the bill would provide that the minimum amounts are based on the number of passenger-carrying vehicles that the motor carrier operates as follows: one to nine passenger-carrying vehicles - \$1,500,000, and for 10 or more passenger-carrying vehicles - \$5,000,000.

The following is a list of laws affecting fidelity bonds that were introduced or enacted into law in November 2006. SFAA also is now tracking new introductions, drafts, and pre-filed bills in order to prepare for 2007, and those are included in this report as well. SFAA's positions are indicated by (-) for opposing/opposed, (=) for neutral and (+) for supporting/supported.

NEW JERSEY

(+) SB 43: *Public Official Bond*

INTRODUCED

SB 43 would require the secretary of a regional school district to post a surety bond. Determination of the amount of the bond would be guided by a schedule of minimum limits that the State Board of Education promulgates. Also, existing law already requires the secretary of a board of education to post a surety bond in the amount of at least \$2,000, conditioned on the faithful performance of duties of his or her office. The law concerning this secretary would be amended to provide that the board would determine the amount of the bond in the same manner described above for regional school district boards. The existing law also would be amended such that the secretary would not have to post an additional surety bond if he or she is an officer of the municipality, which constitutes the district, if the bond he or she has given guaranteeing the faithful performance of his or her municipal duties also covers and secures the faithful performance of his or her duties as secretary. A certificate of coverage with sufficient amounts for both the municipal and the board position would have to be certified to the board of education for the district.