

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee
Contract Bond Advisory Committee

FROM: Lenore S. Marema, Vice President-Government Affairs

DATE: March 23, 2007

SUBJECT: 2007 Overview of the State Legislative Sessions—Contract Surety

There are 41 states and the District of Columbia in regular session. Kentucky is in a veto session, and West Virginia is in an extended session for budget hearings. New Mexico, Utah, Virginia and Wyoming have adjourned for 2007. Idaho, Kansas and South Dakota are due to adjourn in March. The following summarizes key state legislation affecting contract surety that SFAA most recently has been working on with AIA and NASBP. This report updates the February 2007 overview report, which can be accessed on the SFAA website for reference.

Individual Surety Bill is Defeated in New Mexico

New Mexico SB 436 would have permitted individual sureties. SFAA and a number of its members called the New Mexico Insurance Commissioner when the bill was introduced, and the Commissioner was an opponent of the bill.

The New Mexico bill is similar to the Maryland law and the Virginia bill. SB 436 would have deleted all requirements in the existing law that a corporate surety, licensed in New Mexico and on the U.S. Treasury list, provide all bid, payment and performance bonds on public projects. Unlike the Maryland and Virginia versions, the new provisions regarding “personal surety” would have required the surety to be a resident and own real property in New Mexico and excluded attorneys, owners or employees of contractors and subcontractors and anyone related by marriage to the owners or employees of the contractor and subcontractor. The assets that could have been pledged, however, are just as problematic as the other versions of the individual surety legislation. Assets did not have to be deposited in a federally-insured financial institution, but rather can be pledged by way of documents that can be issued by persons or entities unregulated and outside of the United States. The bill also would have allowed “any other form of security that is satisfactory to the obligee.”

Bad Faith

Rhode Island HB 5210 and SB 192 would permit any obligee, principal or claimant under a payment or performance bond to bring an action against the surety when it is alleged that the surety wrongfully and in bad faith refused to pay or settle a claim or refused to perform its obligations under the bond. Compensatory and punitive damages are permitted as well as reasonable attorneys’ fees. The bill was put off for further consideration, which makes it

unlikely, but not impossible, that the bill would be brought up again for consideration and a vote in committee. The House committee hearing on HB 5210 was postponed at the request of the sponsor. The bill still could move in the House, but the decision not to move the bill in the Senate is a big step in killing this effort. Nothing is ever really dead in Rhode Island until the legislature adjourns.

State Bond Thresholds

Indiana SB 211 as introduced would have increased the state bond threshold from \$150,000 to \$500,000 for public works projects. The bill was heard on January 31. SFAA, AIA and the Indiana Surety Association testified in opposition, and NASBP had a local agent (from the Committee Chair's district) who testified in opposition. SFAA and AIA received significant support from the Indiana Association of Cities and Towns and the Association of Counties. The State Department of Administration also testified as to the increased risk to the State from increasing the bond threshold. The local AGC did not take a position on the bill.

The bill was sent to subcommittee from which a compromise arose. The Senate committee amended the bill to create a single \$200,000 bond threshold and to authorize any state or local governmental entity to require bonds on contracts under the threshold. For the cities, towns and counties, this change was significant, as they interpreted existing law to prohibit them from requiring bonds under the threshold. The Senate bill also was amended to require the State Department of Administration to conduct a bond education program at least annually for small, woman and minority owned contractors. SFAA just kicked off a contractor education program with the Indianapolis Black Chamber of Commerce, but the DOA will give us a statewide forum for our Model Contractor Development Program.

SB 211, as amended, passed the Senate and recently was heard in committee in the House. While the Senate compromise was reached without public meetings and testimony, the SFAA and AIA goal in the House was to prevent the opposition from opening up the bill and seeking additional modifications. We did not support or oppose the bill in the House. With the change in composition in the Indiana House since the November elections, it would be difficult for us to amend or stop a bill. The bill was voted out of committee and is now on the Senate floor.

Florida HB 773 would increase the state bond threshold from \$200,000 to \$500,000. SFAA has worked with the Florida Surety Association, and the House sponsor withdrew the bill from further consideration. The companion bill, SB 2090, also is expected to be withdrawn. HB 1153 raises the bond threshold from \$15,000 to \$50,000 for the Hillsborough Aviation Authority. HB 1153 does not have the same payment protections that SFAA and the FSA have obtained in similar legislation for Hillsborough and other counties to the effect that, if the public entity does not require a payment bond, it shall be liable for payment as though a payment bond were in place. The bill is expected to be heard in the near future and SFAA and the FSA will lobby for the addition of this provision.

SFAA has heard from the Carolinas Surety Association that movement is possible on **North Carolina** HB 73/SB 93, which would increase the state bond threshold from \$300,000 to \$500,000. **North Carolina** HB 749 recently was introduced. While HB 73 would change the

state bond threshold, HB 749 would raise the payment and performance bond threshold for the University of North Carolina from \$300,000 to \$500,000.

Georgia HB 192, which would have raised the bond threshold from \$50,000 to \$100,000, has been substituted. The current version of the bill does not change the bond threshold. The substituted bill passed the House and is in committee in the Senate.

Waivers on Large Projects

Florida HB 985 and SB 1928 are similar to a bill that was vetoed last year for reasons unrelated to the surety provisions. The bill would increase the bond threshold for DOT projects from \$150,000 to \$250,000 and would permit the DOT to waive 100% bonds on contracts in excess of \$250 million. For such large projects, the DOT would be permitted to set the bond amount at some portion of the total contract price and accept other forms of security for amounts in excess of the bond. SFAA has contacted the persons in the DOT with whom we worked last year on this bill. The DOT favors bonding but wants flexibility for mega-construction projects. SFAA wants the language in the bill to require bonds for at least \$250 million and to give the DOT authority to accept others forms of security for amounts in excess of that if bonding is not widely available. Both bills are expected to be heard soon. This is the major DOT legislation for this session.

Washington HB 1957 would permit the state Department of Transportation (DOT) to require less than 100% bonds on state highway projects. Under the bill, the DOT would be able to set the amount of the bond to cover the State's maximum probable loss, but the bond could not be less than \$80 million. The DOT requested this bill because of some mega-construction projects on the horizon in Washington. The DOT wants to increase the number of contractors that could bid on these projects by lowering the bond amount to cover the State's maximum exposure to loss rather than the total contract price.

SFAA and AIA met by conference call and asked for alternatives to the percentage bonding under HB 1957. SFAA followed up with approaches that other states have used. The bill sponsor amended HB 1957 in executive session to require the DOT to develop risk assessment guidelines to show how it will measure the State's exposure to loss and how the bond amount that they set protects 100% of the State's loss. The DOT guidelines must be approved by the office of financial management. The Secretary of the DOT must approve every bond issued for less than contract price. The DOT must report to the Legislature in December 2008 on the number of projects on which the DOT authorized bonds for less than the contract price and the number of bidders on such projects. The amended bill was passed out of committee and is awaiting a vote on the House floor.

It is very likely that either HB 1957 or its companion in the Senate, SB 5208, will pass its house of origin before the crossover date, so this will be an active issue for the Washington session this year. SFAA is working to draft a revised bill that would: 1) Exclude the design portion of projects from bonding; 2) Change the \$80 million to \$350 million; 3) Require the DOT to develop its guidelines in a fair and open process, including notice and an opportunity for public comment and written decisions if bonds are waived at amounts in excess of \$350 million; 4) Require the DOT guidelines to fully protect the risk of loss to subcontractors, especially small

businesses and 5) Revisit the issue in two years when the guidelines have been established and there is experience with the \$350 million threshold. It also has been suggested that the upcoming mega-construction projects need to be broken down into separate and distinct smaller projects, each with a clear start and ending point. This would achieve the DOT's objective of getting more contractors to bid on the projects. There was resistance to this idea because of project management concerns. SFAA is making plans to be in Washington State with some of our members that bond mega construction projects to work on the bill with the AIA state counsel.

Public/Private Projects

Possibly as a result of the National Conference of State Legislators (NCSL) 2006 report on state transportation alternatives, a number of states have introduced bills this session to permit public/private partnerships on various highway projects. SFAA reviews these bills for any impact on surety bonding requirements. To date, most of the bills do not alter bonding requirements, but SFAA is working with AIA and NASBP on problems in a few of these bills.

SFAA is working with AIA to amend **Arizona** SB 1635, which would permit a public/private project to construct high occupancy lanes. After constructing the lanes, the private entity would maintain them and be permitted to collect a fee for their use. The bill provides that the Department of Transportation "shall require the private entity entering into a contract to provide a performance bond or other surety for the project as the Department may reasonably require." SFAA and AIA are seeking amendments so that bonding is limited to the construction portion of the project and not the operation and maintenance and to require the public/private entity to obtain payment and performance bonds as required by the state procurement law. SB 1587 has the same issues regarding bonding.

Hawaii SB 70 is moving. It would permit the DOT to permit less than 100% bonding on any public/private project.

Texas SB 965 would permit regional toll way authorities to enter into agreements with private entities for turnpike projects. As drafted, the bill would require the private entity to provide payment and performance bonds, or an alternative form of security, in an amount equal to the costs of constructing and maintaining the project, except that the design portion of the project need not be bonded. If the Authority determines that it is impracticable for the private entity to provide the 100% security required, the Authority can set the amount of the bonds or the alternative forms of security. Instead of bonds, the Authority may require a cashier's check, a U.S. bond or note, a letter of credit or any other form of security the Authority determines to be suitable.

The Texas Surety Federation has been active in proposing amendments which provide that, if a contract exceeds \$500 million and the Authority finds that it is impracticable for the private entity to provide bonds, then the Authority can set the amount of the payment and performance bond at or above \$500 million. SFAA additionally suggested that the bill should require the payment and performance bonds to be in an equal amount and that the performance bond should cover the construction portion of the project only, rather than any maintenance period. HB 3712 is a companion bill with the same problems with the bonding language.

In addition, bonding problems exist with two more companion bills that have been introduced in **Texas** to authorize public/private transportation projects. **Texas** HB 3783/SB 1929 would require a private entity entering into a comprehensive development agreement with the DOT to provide performance and payment bonds or alternative forms of security or a combination of bonds and alternative forms of security, in an amount as determined by the DOT. The existing law permits alternative security. The bills also would authorize the creation of a for-profit company for the acquisition, development and operation of existing and new toll projects. The company would be a private non-government entity. SFAA is working with the Texas Surety Federation to assure that this new company would be subject to state procurement laws, including bond requirements, and has contacted the American Subcontractors Association to get it involved with the legislation because of the potential lack of payment bond protection for subcontractors.

SFAA also was working with AIA to amend **West Virginia** SB 3044 as the bill requires “bid, payment or performance bonds,” which could be misread to authorize less than all three bonds on a project. The bill died when the legislature adjourned.

Retainage

The two most significant retainage bills to date in the 2007 sessions have been defeated.

Colorado HB 1115 would have prohibited retainage on construction contracts. An owner could not withhold retainage from a contractor, and a contractor could not withhold retainage from a subcontractor. Subcontractors also would be prohibited from withholding retainage from a second-tier subcontractor or a supplier. **New Mexico** SB 604, which would have repealed the state retainage law, also has been defeated. It passed the Senate but did not move in the House. **Utah** SB 180 also is dead. It would have reduced the required retainage in school construction contracts from 10% to an amount specified by the school district that could not exceed 5%.

Kentucky HB 490 recently emerged from conference committee. This is a prompt pay bill. Among other provisions, it would set retainage at no more than 10% until the project is 50% completed, after which retainage could be no more than 5%. Within 30 days after substantial completion, retainage must be released, except for an amount equal to 200% of the estimated costs of the uncompleted work remaining. The contractor must give subcontractors their proportional share of any retainage released within 15 days of release by the contracting entity to the contractor.

In other movement on retainage issues, **Arizona** HB 2406 would reduce retainage from 10% to 5% on a contracted commercial project. The retainage would be held in an interest-bearing, escrow account. The bill also would prohibit a general contractor from withholding retainage if the owner does not withhold retainage. The bill has moved out of committee to the House floor. **Kansas** SB 333 has passed the Senate and is in the House. It would permit an owner, contractor or subcontractor to hold no more than 10% retainage in public construction projects. As originally drafted, the bill required a minimum 5% and authorized up to 10%. Existing law in Kansas does not specify a retainage amount. **Maryland** HB 342 would limit retainage on private construction contracts to no more than 5%. **New Jersey** AB 3649 would extend the new retainage law for the Department of Transportation, enacted in 2005, to the New Jersey Turnpike Authority. The bill would require that 2% retainage be held until substantial completion, upon

which 1% would be held. The bill extends the application of the legislation enacted in 2006 that changed retainage on all DOT projects from 5% until 50% completion to 2% for the project. Last year, when SFAA and AIA objected to the change, the DOT argued that there was no net impact on the retainage held for a project. Rather, the change to a flat 2% made administration easier. This year, AIA counsel will attend the hearing and question the experience with the new retainage law on DOT projects before it is expanded to other projects. **Texas HB 2075** would repeal the retainage law in the Transportation Code applicable to DOT projects.

Immigration Bills

Arkansas House Bill 1024 was enacted. This measure prohibits a state agency from entering into or renewing a contract with a contractor who knowingly employs, or has a subcontractor that knowingly employs, an illegal immigrant to perform work under a public contract. The new law applies to any public contract in excess of \$25,000. The new law requires general contractors to certify that they do not employ or contract with any illegal immigrants before executing a public contract. If the general contractor violates the law, the State will give the contractor 60 days to remedy the violation. The State must terminate, for breach of contract, any contractor that fails to remedy within 60 days. Any contractor terminated is liable to the State for actual damages.

The new law also requires any subcontractors employed for a public project to provide the general contractor with a certification regarding their employees. The subcontractor's certification must be completed within 30 days after the execution of the subcontract. The general contractor is required to maintain the subcontractor's certification on file throughout the duration of the term of the contract. If the contractor learns that a subcontractor is in violation of the law, the contractor is permitted, but not required, to terminate the subcontractor. If the subcontractor is terminated, neither the contractor nor the subcontractor is considered to have breached the contract under the provisions of this new law.

The local contractors' associations took the lead in opposition to this bill. The bill was amended in the Senate to require the subcontractor certification to the general contractor; but, overall, it was a politically-charged issue with a lot of public support in Arkansas. It moved quickly to the Governor's desk, where it was signed into law.

Although other states have expressed interest in the immigration issue, such as **Georgia** and **Texas**, SFAA has found no bills in these or other states that impact surety. **Michigan** HB 4397 would prohibit the Department of Management and Budget and all state agencies from contracting for the purchase of services unless the contract provides that only U.S. citizens or legal resident aliens will perform the services. The bill amends the Budget and Management Act, which applies to supplies, materials, services, insurance, utilities, third party financing, equipment, printing and all such items.

Prevailing Wages

Onerous prevailing wage legislation recently was introduced in **Iowa**. HB 810 would: 1) Permit the public entity to terminate a contractor or subcontractor found not to be paying the prevailing wage; 2) Require the contractor or its surety to pay for any excess costs resulting from failure to pay the prevailing wage; 3) Require the *performance* bond to include a provision guaranteeing payment of the prevailing wage rates under the contract; 4) Give workers a private cause of

action against the contractor or subcontractor to recover the difference between wages paid and the prevailing wage, plus reasonable attorneys' fees; 5) Impose an additional penalty on the contractor of 50% of the underpayment to be paid to the State; 6) Require the contractor to pay punitive damages to the workers in an amount equal to 5% of the underpayment for each month it remains unpaid, together with costs and attorneys' fees and 7) Increase the penalty amounts for subsequent violations.

The AIA state counsel advises that the bill will move, at least in the House, and wants some amendments as a back-up position in case the bill cannot be stopped. While our preference is to defeat the bill, SFAA reviewed the bill and will draft a revised bill as a back-up position for AIA state counsel as follows:

—The remedy for failure to pay the prevailing wage should be payment of the wages owed, rather than termination of the contract. Delays and extra costs in public construction projects due to termination of contractors are not in the best interests of the State.

—The bill should be clarified so that the surety bond is not liable for the penalties imposed on contractors and subcontractors for not paying the prevailing wage. If the intent of the penalties is to punish the violators and to encourage compliance with the law, making the surety or any other third party pay for the violations undermines the purpose of the penalties.

—The bill requires a contractor or subcontractor to submit a performance bond, in an amount to be determined by the public body, which shall include a provision that will guarantee the payment of the prevailing wage rate as required in the construction contract. The existing payment bond covers the general contractor for payment of prevailing wages for the general contractor, so the bill needs to clarify that this is a new and additional bond for subcontractors.

SFAA will draft amendments to the bill for use by state counsel. Members of the Government Affairs Advisory Committee and the local surety association in Iowa have been asked for additional thoughts or suggestions on how HB 810 might be improved.

Indemnity Provisions in Construction Contracts

Legislation continues to be introduced in the states that would prohibit clauses in construction contracts that shift liability for negligence and other causes of action in torts. SFAA takes a neutral position on these as long as they do not affect surety. This year, several bills have been introduced that could impact surety. Even though most of this legislation is aimed at addressing indemnification for tort liability rather than contractual liability, SFAA reviews such legislation for any unintended impact on surety.

One example of the impact a bill could have on surety is contained in **Colorado SB 87**, which is on its way to enactment. As originally drafted, the bill would have made provisions in construction contracts void against public policy to the extent that they require any party to the contract or its surety to indemnify another party for the indemnitee's own negligence. As amended and passed, the bill no longer contains the references to surety, so that provisions in construction contracts under which the surety would be liable for the indemnitee's negligence are not void against public policy. In SFAA's experience, when indemnity provisions are prohibited

as to the contractor in construction contracts, the public owner opts to include such provisions in the bond form, which is the case in **Illinois**. The contractor signs the bond form and assumes the liability.

Another way that the surety could be affected is in **Kansas** SB 379. Existing law provides that an indemnification provision in a construction contract or other agreement is void if the indemnitee is indemnified for its own negligence. The law does not define what constitutes an “other agreement.” The bill would extend the prohibition to indemnity provisions in which one party is indemnified for intentional acts or omissions. If a surety bond or General Agreement of Indemnity is considered an “other agreement” under the law, the bill could be misread to void the principal’s indemnity agreement with the surety in a situation, for example, in which the principal intentionally withheld payments from a subcontractor. This is not to say that this would happen, but the bill would change existing law in a way that could make it uncertain and unfavorable to surety.

Legislation also is pending in **Arkansas** HB 1387, **Montana** HB 319, **Nevada** SB 181 and **Oklahoma** SB 755.

While SFAA believes that it is necessary to address these bills on a state-by-state basis to the extent that there is a potential impact on surety, AIA has decided not to work on these bills. AIA reports that its members have not asked them to be actively engaged in these bills and have not expressed any concern about or interest in these bills. They also question whether the legislation presents a practical problem in terms of how often there has been or would be a problem with public owners including indemnification provisions in bond forms compared to the possible downside of opening up the surety issue and the principal’s indemnification agreement with the surety. SFAA has asked its members who are AIA members to urge the AIA to get involved in this legislation and has worked through the local surety associations to advise them of the problems with the legislation, as well as using its contacts in the states in order to address the legislation.

State Bond Guarantee and Technical Assistance Programs

The current state legislative sessions have brought a new wave of proposed programs in the states, as well as renewed efforts in existing programs. States currently operating guarantee programs include **Florida, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Ohio, Oklahoma** and **Tennessee**. Much of the following legislation is not expected to pass, but it shows the extent to which surety bonding for small and emerging contractors again is on the agenda of the states.

Last year, **California** Governor Arnold Schwarzenegger issued an Executive Order (EO) for the creation of a \$40 million State Transportation Bonding Guarantee Fund for small, emerging and disadvantaged businesses bidding on transportation and transit-related projects. AB 1695 would implement the EO and create the Surety Bond Guarantee Account within the California Small Business Expansion Fund. **California** AB 1491 would create a technical assistance program for small contractors, which, among other items, would provide education on surety bonds, financial capability requirements, public works bidding procedures and existing state financial assistance programs.

Colorado HB1209 would require the Director of the Minority Business Office (Director) to establish a surety technical assistance program for historically underutilized businesses. The Director would be authorized to contract with insurance companies, surety companies, agents or brokers for the purpose of implementing the program.

Florida HB 1283/S 2860 would create financial assistance programs for black business enterprises, including a new program offering assistance in obtaining surety bonds. The bill would create the Florida Black Business Investment Board, which would be authorized to guarantee bonds.

New York A 2700 would create academic collaboration districts, which would bring higher education institutions and private businesses into a cooperative effort for economic development. The bill would require that a plan be developed to extend surety guarantees and other assistance to minority- or women-owned contracting companies seeking work on projects in these proposed districts. The plan needs to be completed by December 31, 2009.

Washington HB 2221 would create and provide moneys for the Contractor Assistance and Bond Guarantee Program Fund. The Director of the Program would be authorized to guarantee surety bonds for qualified disadvantaged contractors or qualified small business contractors on public contracts of \$500,000 or less. The Director would be able to guarantee up to 90% of the loss incurred and paid by sureties on bonds guaranteed under this program. The state abolished its previous guarantee program in 2005.

States offering renewed support include **Arkansas, Connecticut, Michigan** and **Mississippi**.

Arkansas HB 1808 would appropriate funds for the development, implementation and administration of the state's Surety Bonding and Mentor Protégée-Training Pilot Program.

Connecticut HB 5569 would provide \$1 million for payment bonds that would be provided for minority contractors working on projects in Bridgeport. In 2006, **Michigan** enacted HB 5796, which instructed the Department of Transportation (DOT) to continue its program to increase the use of women- and minority-owned businesses for state and local road construction projects through education and outreach efforts to these businesses. Notably, the DOT was required to conduct an assessment of the availability of surety to women and minority owned businesses. The DOT is due to report its progress, by March 31, to the House and Senate Appropriations Subcommittees on Transportation and the House and Senate fiscal agencies. SFAA is not aware of any progress to implement this bill.

Anti-Directed Surety

North Dakota HB 1033 revises the State's procurement code. The new law retains the existing \$100,000 bond threshold and adds an anti-directed surety provision. **Hawaii** HB 1833 would enact an anti-directed surety provision applicable to any public or private project in which bid, payment and performance bonds are required. The bill passed the House and is in the Senate.

Penalties for Defaulting Contractors is Defeated

Mississippi HB 373 is dead for this session. It would have imposed new penalties on contractors for failing to complete construction, reconstruction or repair to highways, roadways, bridges,

drainage structures or other property or infrastructure damaged or destroyed as a result of a natural or man-made disaster. If a contractor were 30 days late, the penalty was double the penalty ordinarily imposed by the State Highway Commission in other contracts. If a contractor were 45 days, the penalty was triple the penalty and the contract would be terminated and rebid. The bill provided that either the contractor or the surety bond would have to respond to these increased penalties.

Contracts with Veterans

Arkansas and Connecticut joined a number of other states with legislation for contracting with service disabled veterans. **Arkansas** HB 1646 would give a 10% preference and set a 3% goal of the Office of State Procurement in awarding contracts to qualified disabled veterans.

Connecticut SB 1020 would require a 3% set aside for such contractors measured by the total value of all construction contracts let by each agency in a fiscal year. As reported last month, such legislation also is pending in **Indiana, Pennsylvania** and **Washington**. The Indiana bill has passed the House and is in committee in the Senate.

Countersignature

South Dakota HB 1180 repeals the countersignature law.

Other Legislation of Interest

In 2005, **Oregon** required any contractor or subcontractor working on a public project to post a \$30,000 public works bond. This new bond is in addition to any payment and performance bonds required and would be used to pay wage claims of workers, including prevailing rate claims. Disadvantaged, minority- or woman-owned and emerging small businesses were given a waiver on the bond for one year. Legislation has been introduced in HB 2776, 2777 and 2778 this year to extend the waiver to five years. HB 2824 would exempt contractors and subcontractors working on residential affordable housing projects from the public works bond requirement.

Texas SB 1221 would give preference to contractors providing health insurance to all their full time employees and their families. If a contractor used such a preference, the construction contract must contain a provision that failure to comply constitutes a breach of contract.

2007 Overview of the State Legislative Session—Commercial Surety

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Illinois Power of Attorney Legislation

SFAA drafted legislation and background information and, beginning in 2006, worked with AIA to amend the **Illinois** law to give sureties the option of attaching a power of attorney (POA) to each bond or recording the power of attorney in the circuit courts. This legislation is needed to alleviate the current burden of annual filings required in some state circuit courts, most notable in Cook and DuPage Counties. AIA had the bill reintroduced this year as HB 780. SFAA took the lead in testimony before the House Judiciary Committee, where the bill passed out of committee 9-0. SFAA and AIA will work to get the bill on the House consent calendar when it comes to the Floor, which may not be for two months.

Several problems have arisen. The Association of Circuit Court Clerks voiced opposition to the bill. The clerks from the circuit courts outside of the Chicago area fear that the bill may create a filing requirement, which in turn would cause them to have a process to receive and a place to store and make available any POA filings received. They are not persuaded by the fact that this bill is intended to eliminate filings in the two circuit courts that require them and is unlikely to generate new filings elsewhere. In the conversations with the clerks' association, SFAA told them that we would rather eliminate the filing altogether, and drafted amended language to offer as a substitute on the House floor to eliminate the filing. A Cook County circuit court judge now has been writing letters to members of the House stating that these filings are necessary and that the Legislature should not eliminate them. Part of the contention is that many other state courts require such filings. Last year, SFAA polled the local surety associations in all the states surrounding Illinois and confirmed that none require filing of POAs. As requested by our bill sponsor, SFAA and AIA will be meeting with this judge.

PERMIT BONDS

North Carolina SB 1159 requires installers of modular homes to obtain a \$5,000 permit bond before installing any house to assure compliance with the State Building Code.

LICENSE BONDS

Home Improvement Contractors

—**New Legislation.** **Iowa** SB 317 would require home improvement contractors to post a \$75,000 bond, which would respond to any person damaged by the contractor's breach of contract or violation of law. **Oregon** HB 3242 would create levels of contractor licensing and specify bonding requirements for each. The bond amounts would be: Level I general commercial contractor -- \$75,000; Level I specialty contractor -- \$50,000; Level II general or specialty contractor -- \$25,000; general residential contractor -- \$15,000 and specialty residential contractor --\$10,000. Separate bonds are required for each license category. **Oregon** HB 3393 requires construction labor contractors to be licensed and bonded. The amount of the bond is \$10,000 if the contractor has 20 or fewer employees and \$30,000 for 21 or more employees. **South Carolina** SB 523 would increase the license bond of residential builders to \$30,000. **Washington** SB 5047 would require residential contractors to be licensed and bonded.

—**Bills on the Move.** **New Mexico** HB 733 would repeal the existing contractor's license bond requirement and replace it with a new requirement. Existing law provides for small bond amounts based on the size of the projects the contractor undertakes. Under the bill, the bond

required must be used to compensate only for actual damages incurred as a result of the licensee's violations of the law and not attorney's fees, punitive damages or pain and suffering. There is no bond amount specified in the bill, although the surety's liability is limited to the aggregate amount of the bond. The bill passed the House and is on the Senate floor.

Washington HB 1876 was substituted, and it passed the House. As originally drafted it would have required certification of mechanics performing heating, ventilating, air conditioning, refrigeration and gas piping work. As substituted, the bill recommends that a trade coordination panel address industry's concerns about certification and consider alternatives to resolving conflicts in the scope of the various mechanics. This could be a new opportunity for bonding.

—**Dead for 2007. Maryland** HB 1019/SB 704 would have provided that a person can receive a deposit of more than one-third of a home improvement contract if the contract provided for payment and performance bonds, a lien and completion bond or an approved bond equivalent.

Mortgage Brokers and Lenders

The first bills have been introduced for a uniform residential mortgage broker licensing system among the states. This is a joint project between the Conference of State Bank Supervisors and the American Association of Residential Mortgage. This project has many parallels in the Uniform Company Admissions Application (UCAA) of the National Association of Insurance Commissioners, in that each state retains its authority to make a licensing decision; but a uniform application for a license can be submitted to all states. As it is being planned, this effort will have no impact on mortgage broker and lender license bond requirements, as each state still has its own financial security requirements. If the NAIC experience means anything, the uniform application likely will be a high common denominator of the state requirements; but, once states get experience in reviewing the information submitted with the standard application form, states will move to some uniformity in state licensing requirements. The current bills are **Arkansas** HB 2407, **Connecticut** HB 7116 and **Mississippi** SB 2350.

—**New Legislation. Florida** HB 1355/SB 2526 would exempt any natural person from licensing and bonding as a mortgage broker if they are under an exclusive contract with a licensee. The licensee would be required to post a \$5 million bond to cover the activities of all contractors. **Minnesota** HB 1748/SB 1547 would require a license bond or letter of credit in the amount of \$100,000. **Texas** HB 1716 would require financial services companies to post a \$1 million license bond to cover the mortgage broker activities of exclusive agents.

—**Bills on the Move. Mississippi** SB 2350 would require mortgage lenders to be licensed and bonded. The bond amount is \$150,000, unless the person or entity was otherwise required before July 1, 2007, to be licensed and bonded at an amount of \$50,000. In that case, the \$150,000 bond is not required until the 2007 license renewal. The \$25,000 license bond for mortgage brokers remains intact. The bill has passed the House and Senate and is in conference committee. **South Dakota** SB 165 would repeal and re-enact revised provisions regarding the licensure and bonding of mortgage lenders and brokers. The \$25,000 license bond remains intact. The bill is on the Governor's desk for signature. **West Virginia** HB 2776/SB 385 would require the license bond to respond to a State claim for an unpaid examination invoice or a civil administrative penalty.

Check Cashing/Money Transmitters

—**New Legislation.** **Alaska** SB 116 would require money transmitters to be licensed and bonded. The bond amount must be \$25,000, plus \$5,000 per location up to \$125,000 so that the maximum amount of the bond is \$150,000. **Georgia** SB 70 would limit the total bond amount for sellers of checks and money transmitters to \$1.5 million. **Maryland** SB 169 would require check cashing services to be licensed and bonded. The surety bond would be \$5,000 per location.

Payday Lenders

—**Bills on the Move.** As drafted, **Georgia** HB 163 would have required payday lenders to be licensed and bonded. The amount of the bond would have been \$25,000 per location with a \$250,000 maximum. The bill was substituted in committee; and the bond amount was increased to \$50,000, although the maximum cap remained the same. The bill passed out of committee.

—**Dead for 2007.** **West Virginia** HB 2820 would have required a \$25,000 per location bond for payday lenders, up to a maximum \$250,000.

Consumer Loans

—**New Legislation.** **Georgia** HB 420 would require any person making a loan in excess of \$3,000 to be licensed and bonded. The bond would be \$25,000 per location, up to \$250,000. The bill does not apply to most state or federally regulated financial institutions.

Credit Counseling and Debt Management Services

—**New Legislation.** **Minnesota** HB 1515/SB 1532 would require licensing and bonding. The license bond amount would be not less than \$5,000, and state regulators also could require a fidelity bond. **Rhode Island** HB 5014 would require licensing and a \$50,000 bond. The surety would have to be “A” rated from a nationally-recognized rating organization. Insurance, letters of credit or U.S. bonds could be offered in lieu of a surety bond. SFAA is working with AIA to eliminate the requirement of an “A” rating.

Debt Collectors

—**New Legislation.** **Rhode Island** SB 34 would require debt collectors to be licensed and bonded. The amount of the license bond is \$15,000.

Motor Vehicle Bonds

—**Bills on the Move.** **Missouri** HB 699 is moving in the House as substituted. It would raise the amount of the motor vehicle dealer license bond from \$25,000 to \$30,000. **West Virginia** HB 2028, which would increase the bond for motor vehicle dealers from \$10,000 to \$50,000, passed the House and is in committee in the Senate.

Motor Vehicle Salespersons

—**New Legislation.** **Colorado** SB 221 would increase the license bond from \$5,000 to \$15,000.

APPEAL BONDS

—**Enacted Laws.** **Wyoming** HB 196 caps appeal bonds at \$25 million regardless of the amount of the judgment. In any action, however, in which the appellants are individuals or entities with fewer than 50 employees, the appeal bond cannot exceed \$2 million.

—**New Legislation.** **Connecticut** SB 1439 would repeal the \$150 bond required for appeals in probate court. **Rhode Island** SB 476 would cap appeal bonds at \$50 million regardless of the amount of the judgment.

—**Bills on the Move.** **Kentucky** HB 426 would cap appeal bonds at \$100 million. The bill has passed the House and has moved out of committee in the Senate. **Oklahoma** HB 1620, which has been amended to cap appeal bonds at the lesser of \$25 million or 25% of the appellant's net worth, has passed out of the House Judiciary and Public Safety Committee. As originally drafted, the cap was set at the lesser of \$25 million or 10% of net worth.

UNIFORM TRUST CODE

To date, only two states introduced the Uniform Act in 2007, but both bills are moving.

—**Enacted Law.** **North Dakota** HB 1034 enacts the Uniform Trust Code of the National Conference of Commissioners on Uniform State Law. Under the new law, a trustee would need bonding only when the court deems it necessary to protect the trust or if the court has not otherwise dispensed with the requirement. The court could set the amount of the bond and modify and terminate the bond at any time.

—**Bills on the Move.** **New Mexico** HB 182 also would enact the Uniform Trust Code. The bill has passed both houses and is on its way to the Governor.

NOTARY BONDS

—**New Legislation.** **Kentucky** HB 248 would enact a comprehensive new system for licensing and regulating notaries under the Secretary of State. A \$25,000 license bond would be required. **Tennessee** HB 1325/1384 and SB 651/1453 would increase the bond amount from \$10,000 to \$25,000.

SOME RECENT COMMERCIAL SURETY ISSUES

Tax Bonds for Wine Shipments

The U.S. Supreme Court's 2005 decision in *Granholm v. Heald*, which struck down state regulatory schemes that permit in-state wineries to ship directly to consumers but restrict the ability of out-of-state wineries to do so, continues to have surety bond implications in that states are requiring license and/or tax bonds to assure that out-of-state wineries shipping wine to consumers in the state comply with the laws and pay their taxes. **Florida** SB 126 would authorize direct wine shipments for shippers that are licensed and bonded in an amount of \$5,000. The State could accept a bond of a lesser amount if the volume of business were such that a lesser bond amount would be acceptable. The bond cannot be less than \$1,000. **Georgia** HB 393 would expand the licensing and bonding requirements for domestic farm wineries to all

farm wineries. **Missouri** HB 944/SB 644 would apply the existing licensing and \$1,000 bond requirement to out-of-state wineries shipping to consumers in the state.

Boxing/Martial Arts

There is some interest among the state in licensing and bonding promoters of these events

—**New Legislation.** **Alabama** HB 27 would create the state Boxing Commission and require a promoter to be licensed and bonded in an amount that the Commission would require. Promoters also would need a permit for each match.

—**Bills on the Move.** **Illinois** HB 1947 would extend the license and bonding requirements for boxing to promoters of martial arts matches. The bill is on the House floor.

Amendments to the Uniform Commercial Code

In its Restatement of the Law on Surety, the American Law Institute (ALI) referred to sureties as “secondary obligors” even though ALI restatements generally summarize an existing body of law rather than break new ground. This new terminology has cause states to amend their versions of the Uniform Commercial Code to contain the reference to surety as “any other secondary obligor.” These changes to the law have no substantive impact on surety. Pending legislation is **Florida** HB 151/SB 252, **Iowa** HSB 264/SSB 1327/SB 535, **Indiana** SB 419 and **Utah** SB 91.

—**Bills on the Move.** **Utah** SB 91 has been sent to the Governor for signature. **Indiana** SB 419 has passed the Senate and is out of committee in the House.

Private Investigators

—**New Legislation.** **Alaska** HB 158 would require a \$15,000 license bond or E&O insurance.

—**Bills on the Move.** **Indiana** SB 506 would change the private detective license law to the private investigator firm license law. The firm would have to post a \$7,000 license bond. The bill has passed the Senate. **New Mexico** SB 621 would require the licensure and bonding of private investigation and private patrol companies instead of individuals. The bond amount is \$10,000. The bill has passed the Senate and is moving in the House.

—**Dead for 2007.** **Colorado** HB 1083 is dead. It would have required a surety bond or E&O policy of \$100,000. **Wyoming** HB 231 would have required a \$2,000 license bond for any boxing club or organization obtaining a permit.

Wholesale Distributors of Prescription Drugs

—**New Legislation.** **Kansas** HB 2392 would require wholesale drugs distributors that provide services within the State to be licensed and bonded. The license bond amount is \$100,000.

Maryland HB 1030 requires wholesale distributors to post a \$100,000 bond.

—**Bills on the Move.** **Illinois** S 509 would require a \$100,000 bond in connection with licensure as a wholesale drug distributor. The bill is on the Senate floor.

Other

—**Indemnity Agreements.** Maryland HB 898 would provide that indemnity agreements in motor carrier transportation contracts that indemnify the promisee for liability resulting from the promise's own conduct are void against public policy.

2007 State Legislative Sessions—Fidelity

There are 41 states and the District of Columbia in regular session. Kentucky is in a veto session, and West Virginia is in an extended session for budget hearings. New Mexico, Utah, Virginia and Wyoming have adjourned for 2007; Idaho, Kansas and South Dakota are due to adjourn in March. The following summarizes key state legislation affecting fidelity bonds that the SFAA most recently has been working on with AIA and NASBP. Generally, these are bills that would present new bond opportunities for fidelity or affect an existing bond. This report updates the February 2007 overview report, which can be accessed on the SFAA website for reference.

ENACTMENTS

Public Officials

Nebraska LD 347 provides that a schedule, position or blanket bond or evidence of equivalent insurance can be obtained for public officials in any city, town or village required to be bonded or a single corporate surety or fidelity bond, schedule, position or blanket bond or equivalent insurance coverage covering all officers, including those required to furnish an individual bond. The bond or insurance coverage would have to be in an amount at least equal to the aggregate amount required by prior law.

Utah SB 71 repeals a requirement that fidelity bonds for county officials be recorded. The prior law required that the bond be recorded in the Office of the County Recorder. The bond now only needs to be filed with the county clerk as provided in existing law.

Professional Employer Organizations

Utah HB 29 clarifies the law regulating professional employer organizations (PEOs). It provides that, unless a professional employer agreement expressly provides otherwise, a client of the PEO is solely responsible for directing, supervising, training and controlling the work of the covered employees with respect to the business activities of the client and is solely responsible for the acts, errors or omissions of the covered employees with regard to those activities. Existing law already provides that an employee of a PEO is not, solely as the result of being an employee of a PEO, an employee of the PEO for purposes of general liability insurance, employment practices liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation or liquor liability insurance carried by the PEO, unless the employee is included by specific reference in the PEO agreement and applicable prearranged employment contract, insurance contract or bond.

BILLS ON THE MOVE

Public Officials

Kentucky HB 5 would create the Kentucky Energy Development Authority and require its treasurer to post a surety bond for the faithful performance of his duties and accounting of all funds handled. The bill passed the House and was amended in the Senate on issues unrelated to bonding and is now back in the House for concurrence.

Kentucky SB 55 would eliminate the Savings Bond Authority and, in so doing, would eliminate the existing bonding of the commissioner and treasurer. The bill passed the Senate and is moving out of committee to the House floor.

Missouri HB 426 would create the Propane Safety Commission and permit the Chairman of the Commission to obtain a blanket bond covering all members of the Commission and the employees in lieu of individual bonds. The bill passed the House and is in committee in the Senate.

Mississippi HB 1510 would authorize the new Community Corrections Commission to obtain fidelity bonds for the faithful performance of the duties of the Commission's personnel. The bill passed the House and has moved out of committee in the Senate to the floor.

Professional Employee Organizations

North Dakota SB 2036 would provide that an employee is not, solely as the result of being an employee of a PEO, an employee of the PEO for purposes of general liability insurance, employment practices liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation or liquor liability insurance carried by the professional employer organization, unless the covered employee is included by specific reference in the PEO agreement and applicable prearranged employment contract, insurance contract or bond. The bill passed the Senate, was amended and passed in the House and now is back to the Senate for concurrence. Similar legislation, **West Virginia** HB 2895, has moved out of committee in the House.

Virginia HB 2016/ would require any managing agent of a condominium and property owners association to obtain a blanket fidelity bond or employee dishonesty insurance policy. The bill has been sent to the Governor for signature.

NEW FIDELITY LEGISLATION

Public Officials

There is other state legislation that would create "surety bonding" requirements for various public officials. Such language in legislation often requires coverage that often is provided by a fidelity bond, despite the terminology used in the law. Because of their state laws, **Florida** and **Georgia** have numerous bills each year to charter new cities and towns and districts and authorities to provide services; and this year is no exception. Both states are early in their 2007

session, but we would expect most of this legislation to pass. **Mississippi** has a number of bills to create various county tourism bureaus. All require bonding.

Iowa SB 77 would create a Department of Environmental Protection and require the Department to obtain an adequate public employees fidelity bond to cover officers and employees.

Iowa SB 502 would repeal the requirements that the Division of Savings and Loans provide a \$20,000 bond for each the Department's examiners.

North Carolina SB 772 would increase the minimum fidelity bond required of school finance officers from \$10,000 to \$50,000 and eliminate the \$250,000 cap on the bond.

Condo Associations

Hawaii HB 1627/SB 1704 would permit a community association unable to obtain the required fidelity bond to apply to the Real Estate Commission for an exemption, deductible or bond alternative. **Illinois** HB 1071 would require managers of community associations to be licensed and bonded. A fidelity bond would be required in an amount not less than all the funds of the association and must cover the manager and all partners and employees of the firm in which the manager is employed. **Illinois** SB 196 contains a similar bonding requirement.

Pharmacy Benefit Managers

Maine SB 450 would require all pharmacy benefits managers to be licensed and maintain a fidelity bond equal to at least 10% of the funds handled. **Texas** HB 1974 is similar.

Other

Minnesota HB 1515 requires debt management service providers to provide a license bond and permits state regulators to require a fidelity bond for employees.