

# THE SURETY & FIDELITY ASSOCIATION OF AMERICA

## MEMORANDUM

**TO:** Government Affairs Advisory Committee  
**FROM:** Daniel Wanke  
**RE:** Fidelity Bond Legislation  
**DATE:** February 3, 2010

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There are 36 states and the District of Columbia in regular session, while four states are pre-filing for upcoming sessions. The following report compiles and summarizes fidelity bond legislation under consideration in 2010, which SFAA is tracking and addressing, as necessary, with the AIA and the local surety associations. Summaries of legislation that have appeared in previous SFAA reports have been marked (♦) for your convenience.

In almost all of the states, 2010 marks the second year of the legislative session, except for New Jersey and Virginia, which are beginning a new session. Montana, Nevada, North Dakota, Oregon and Texas will not meet in 2010 as they only meet every other year. Arkansas for the first time is holding a “fiscal session” this year to address the state budget, which is a departure from its usual biennial session. The following is a compilation of legislation currently pending that would impact fidelity bonds. As always, your input is vital to our efforts, so if you have any questions, comments or information on legislation, please do not hesitate to contact us.

### ALABAMA

#### HB 188: Public Officials

**INTRODUCED:** 01/12/2010

**STATUS:**

01/26/2010 Passed House. To Senate.

**POSITION:** Support—New Bonding Opportunity.

HB 188 would require the employees or officials of an emergency telephone district that handle or disburse its funds to post a bond in an amount not less than the total funds that the district received in the prior fiscal year.

### COLORADO

#### HB 1062: Public Officials

**INTRODUCED:** 01/13/2010

**STATUS:**

01/29/2010 Passed House. To Senate.

**POSITION:** Seeking Amendments

HB 1062 would give counties the option of purchasing crime insurance coverage in lieu of a public official bond to protect against the malfeasance of various county officers. Although we generally oppose attempts to repeal or allow alternatives to a bond requirement, SFAA members actively write both of these coverages. There is, however, a problem with taxpayer lawsuits under crime insurance policies under Section 30-10-316 such that the crime insurance option intended in this legislation likely would not be workable.

Under current law, in which a public official bond is required, the district attorney, county attorney or any taxpayer of the county that will become liable for the costs of the suit can bring suit against the principal and the sureties on the bond to recover damages that the county has suffered. HB 1062 would amend this provision to similarly allow such persons to bring suit under the crime insurance policy. Since crime insurance is a two-party agreement that generally does not permit third-party suits, we believe that the intended option of crime insurance may not be widely available. SFAA had the AIA state counsel explain the differences in the coverage provided between the bond and the crime insurance. We suggested improvements to the bill, but they were not included in the bill as passed in the House.

## **FLORIDA**

### **HB 511/SB 1162: Public Officials**

**PRE-FILED:** 12/17/2009

**STATUS:**

12/17/2009 Pre-filed.

**POSITION:** Support—New Bonding Opportunity

HB 511/SB 1162 would create the Children's Trust of Collier County (Trust) to provide public services for children. The Trust would be authorized to assess ad valorem taxes on all taxable property in Collier County. The bill would require the chair of the Trust or any other trustee or employee who signs checks on behalf of the Trust to post a surety bond in an amount equal to at least \$1,000 for each \$1 million of funds assessed annually. The bond would be conditioned on the faithful performance of the duties of office. The trustees would decide the actual bond amount required based on "professional advice."

### **SB 146/HB 153: Public Officials**

**PRE-FILED:** 10/05/2009

**STATUS:**

10/05/2009 Pre-filed

**POSITION:** Support—New Bonding Opportunity

SB 146/HB 153 would authorize counties to create districts that provide services for seniors. The chair of each council for these districts and any other designee or officer authorized to sign checks would have to post a surety bond in an amount equal to \$1,000 for every \$1 million, or portion thereof, of the council's annual budget. The bond would be conditioned on the faithful performance of the duties of office.

## **ILLINOIS**

### **HB 1188: Miscellaneous Bond—Cemetery Authorities**

**INTRODUCED:** 02/11/2009

**ENACTED:** 01/19/2010

HB 1188 provides for the oversight of cemeteries, requiring cemetery authorities to be licensed. Unless the cemetery authority has obtained a full or partial exemption from the licensing requirement, the new law requires the licensee to obtain a fidelity bond, proof of self-insurance, or letter of credit in an amount that would be required through rules. The bond secures the care funds that the cemetery authority holds for the cemetery's maintenance. The bond must be from a bonding company authorized to do business in the State. The new law provides that the bond may be terminated with 60 days notice. If the funds were held by an entity authorized to do a trust business under the Corporate Fiduciary Act or held by an investment company, then the bond is not required. As introduced, the bill did not impact bonding, but it was amended in the Senate and then quickly passed both chambers and was enacted.

## **HAWAII**

### **HB 2336/SB 2011: Miscellaneous Bond—Professional Employer Organizations**

**INTRODUCED:** 01/21/2010

**STATUS:**

01/21/2010 Introduced.

**POSITION:** Support—New Bonding Opportunity

HB 2336/SB 2011 would require PEOs to maintain a positive working capital of not less than \$100,000. If the PEO does not have a positive working capital, the bill would permit it to post a bond, letter of credit, or securities in an amount that would make up the deficiency. The bond would secure the payment of any tax, wage, benefit, or other entitlement due to or with respect to a covered employee if the PEO does not make the payment when due. The bill also would provide that a "covered employee is not, solely as the result of being a covered employee of a professional employer organization, an employee of the professional employer organization for purposes of general liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation and employer's liability insurance carried by the professional employer organization unless the covered employee is included by specific reference in the professional employer agreement and applicable prearranged employment contract, insurance contract or bond." These provisions are based on model legislation adopted in other states.

## **INDIANA**

### **SB 131: Public Official Bond**

**INTRODUCED:** 01/05/2010

**STATUS:**

01/05/2010 Introduced.

**POSITION:** Support

SB 131 would clarify existing law to provide that town clerk-treasurers appointed to office are subject to the existing bond requirement for elected town clerk treasurers.

### **SB 298/SB 397: Public Officials**

**INTRODUCED:** 01/11/2010

**STATUS:**

02/02/2010 Passed Senate. To House.

**POSITION:** Support—New Bonding Opportunity  
SB 298/SB 397 would create the Indiana Public Retirement System (System) for the management of various state retirement funds, pensions and disability or benefit funds. The Director of the System would be required to post a corporate surety bond in an amount that the System's board of directors determined. **SB 398** passed out of committee in the Senate.

## KENTUCKY

### HB 110/SB 81: Public Officials

**INTRODUCED:** 01/05/2010

**STATUS:**

01/27/2010 From House Committee on Licensing and Occupations:  
Reported Favorably.

01/28/2010 Posted for Passage in Regular Orders of the Day.

**POSITION:** Oppose—Repeals Bond Requirement

HB 110/SB 81 would eliminate the bond requirement for the secretary-treasurer of the State Board of Licensure for Professional Engineers and Land Surveyors (Board). A bond is required for this office and any other person handling the Board's expenditures or disbursing its funds. The Board determines the amount required.

### HB 221: Public Officials

**INTRODUCED:** 01/08/2010

**STATUS:**

01/08/2010 Introduced.

01/15/2010 Posted in committee.

**POSITION:** Support—New Bonding Opportunity

HB 221 would establish regional wastewater commissions (commission). Each commissioner would have to post a bond to secure the faithful performance of his or her duties. The bond also would secure all money coming into the commissioners' hands or under their control. The bond amount would be based upon the maximum amount of public funds the commissioner handles at any given time during a fiscal year. The commission would be responsible for determining the amount required.

## MASSACHUSETTS

### ◆ HB 4138: Public Officials

**INTRODUCED:** 06/25/2009

**STATUS:**

01/20/2010 In Joint Committee on Health Care Financing: Heard.  
Eligible for Executive Session.

**POSITION:** Support—New Bonding Opportunity

HB 4138 would create the Cape Care Community Health Trust (Trust). The bill would require all of the Trust's officers and employees that have access to its cash or negotiable securities to post a bond in an amount and with such surety as the Trust's Board of Trustees prescribed. The persons required to post the bond could be included in one or more blanket or scheduled bonds.

## MISSOURI

### HB 1641/SB 722: Public Officials

**INTRODUCED:** 01/13/2010

**STATUS:**

01/13/2010 Introduced.

**POSITION:** Support—New Bonding Opportunity

HB 1641/SB 722 would establish the Missouri Universal Health Assurance Program (Program). The Executive Director of the Program's Board of Governors (Board) would be responsible for all funds, securities and property belonging to the Program and would have to post a corporate surety bond for the faithful handling of the Program's money as the Board requires.

### SB 689: Public Officials

**INTRODUCED:** 01/06/2010

**STATUS:**

01/06/2010 Introduced.

**POSITION:** Support—New Bonding Opportunity

SB 689 would create the Missouri Clean Energy Technology Center (Center), whose officers and employees would have to post a surety bond if they have access to the Center's cash or negotiable securities. Blanket or scheduled bonds would be accepted to cover all those having to post the bond.

## NEBRASKA

### ◆ LB 579: Miscellaneous Bond—Professional Employer Organizations

**INTRODUCED:** 01/21/2009

**STATUS:**

01/26/2010 Committee Amendment Adopted on Legislative Floor.  
Amendment: AM1323

**POSITION:** Oppose—Adverse Selection

LB 579 would require Professional Employer Organizations (PEO) to maintain a positive working capital. If the PEO does not have a positive working capital, it would have to obtain a bond, letter of credit, or securities in an amount that would make up the deficiency plus an additional \$100,000. The bond would secure the payment of any tax, wage, benefit, or other entitlement due to or with respect to a covered employee if the PEO does not make the payment when due. The bill also would provide that a "covered employee is not, solely as the result of being a covered employee of a professional employer organization, an employee of the professional employer organization for purposes of general liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation and employer's liability insurance carried by the professional employer organization unless the covered employee is included by specific reference in the professional employer agreement and applicable prearranged employment contract, insurance contract or bond." These provisions are based on model legislation that has been introduced and enacted in other states in past sessions.

### LB 722: Public Officials

**INTRODUCED:** 01/06/2010

**STATUS:**

01/26/2010 From Legislative Committee on Government, Military and Veterans Affairs: Placed on General File as Amended.  
01/29/2010 Committee Amendment Adopted on Legislative Floor.  
Amendment: AM1616

**POSITION:** Neutral

LB 722 would revise the existing bond requirements for all state employees. Current law requires all employees not specifically required to post a bond to be covered under a blanket surety bond or insurance policy in an amount not to exceed \$1 million. The bill would eliminate the specified amount and confer authority on the State's risk manager to determine the amount required.

## **NEW JERSEY**

### **SB 168: Captive Insurers**

**INTRODUCED:** 01/12/2010

**STATUS:**

01/12/2010 Introduced.

**POSITION:** Oppose

SB 168 would regulate captive insurance companies. Of note, the bill would permit captives to write fidelity and surety insurance, among other lines.

## **NEW YORK**

### **AB 9471: Public Officials—Municipal Reciprocal Insurers**

**INTRODUCED:** 01/06/2010

**STATUS:**

01/06/2010 Introduced.

**POSITION:** Oppose

AB 9471 would permit statewide municipal reciprocal insurers to issue public official bonds. Existing law allows such reciprocals to provide any one or more of the basic kinds of insurance except workers compensation, employers' liability, fidelity, surety, credit and marine and inland marine insurance. The bill essentially carves out an exception to the prohibition against writing surety and fidelity bonds. SFAA worked with AIA last year to defeat similar legislation, which would have permitted the New York Mutual Insurance Reciprocal (NYMIR) to write public official bonds. SFAA questioned how NYMIR would perform the prequalification function that makes surety bonding unique among insurance products.

## **UTAH**

### **HB 98: Public Officials**

**INTRODUCED:** 01/25/2010

**STATUS:**

01/25/2010 Introduced.

**POSITION:** Oppose—Repeals Bond Requirement

HB 98 would eliminate the bond requirement for the state engineer. Current law requires a \$5,000 bond to secure the faithful performance of the duties of office.

## WASHINGTON

### HB 2564/SB 6405: Escrow Agents

**INTRODUCED:** 01/11/2010

**STATUS:**

01/19/2010

From House Committee on Financial Institutions and Insurance: Do Pass as Substituted.

**POSITION:** Neutral

HB 2564/SB 6405 would revise the existing requirements for escrow agent bonds. Currently, escrow agents must obtain a \$200,000 fidelity bond that has a minimum \$10,000 deductible, a \$50,000 error and omissions insurance policy or a \$50,000 deposit of cash or securities, and a \$10,000 surety bond. HB 2564 also revises the coverage that would have to be provided under the fidelity bond. Under existing law, the fidelity bond currently covers any fraudulent or dishonest act of the escrow agent's employees or officers as defined in the bond. The bill instead would require the fidelity bond to cover the fraudulent or dishonest acts of the escrow agent's corporate officers, partners, sole practitioners, escrow officers, and employees of the applicant engaged in escrow transactions acting alone or in collusion with others. Under current law, the bond is for the sole benefit of the escrow agent and the surety is not liable under the bond to any other party. HB 2564 would provide instead that if a corporate officer, partner or sole practitioner commits the fraudulent or dishonest act, then the bond shall be for the benefit of the harmed consumer. We believe this provision substantially changes the nature of fidelity coverage and we do not think that a fidelity bond under these terms would be widely available.

The bill provides that if the fidelity bond coverage was not available, then a surety bond would be required. The bond would have to be in an amount that is "adequate to protect the public interest" according to the determination of the Director of Financial Institutions (Director). The Director would promulgate rules for the bond amount, which would have to be based on the average monthly balance of client trust funds that the agent handles. It could not be for less than \$25,000 or more than \$250,000. The bond would be conditioned on compliance with the law and the reimbursement of persons suffering a loss resulting from the licensee's violations of the law. The bill also provides for cancellation of the bond with 30 days notice from the surety, and the surety's aggregate liability would be limited to the penal sum of the bond. The recent substitution did not impact the bonding provisions in HB 2564. **SB 6405** passed out of committee in the Senate.

SFAA has written the bill sponsor a letter explaining the differences between surety and fidelity bonds and offered SFAA as a resource for addressing bonding questions regarding escrow agents.