The Surety & Fidelity Association of America

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August 28, 2015

Via Electronic Mail and U.S. Mail

Jacqueline A. Wolfgang
Counsel, State Board of Certified Real Estate Appraisers
P. O. Box 69523
Harrisburg, PA 17106-9523

Re: Initial General Rulemaking
Appraisal Management Company Registration Act ("Act")
49 PA Code Ch. 36

Dear Ms. Wolfgang:

The Surety & Fidelity Association of America ("SFAA") is a non-profit corporation whose member companies collectively write the majority of surety and fidelity bonds in the United States. SFAA is a licensed rating or advisory organization in all states and is designated by state insurance departments as a statistical agent for the reporting of fidelity and surety experience. The vast majority of bonds that secure regulatory obligations are provided by SFAA members. We appreciate the opportunity to provide comment regarding the captioned proposed rulemaking, particularly the provisions concerning the surety bond requirement (49 Pa. Code §§ 39.451 *et seq.*). We offer recommendations regarding how the provisions could be revised or clarified to ensure that the bond is reasonably available in the market.

First, 49 Pa. Code § 36.451(b) requires that the surety providing the bond must be authorized to transact surety business in the Commonwealth by the Pennsylvania Insurance Department and have a certain rating by an NRSRO. We maintain that licensure by the Insurance Department is sufficient criteria. Relying on the state insurance department would be the most effective way to assure the sound financial condition of the surety.

As insurance companies, sureties are subject to substantial state financial regulation. To engage in the surety line of business in a particular state, the surety must be licensed in the state and subject to the regulation of the state insurance department, which includes minimum capital and surplus requirements, financial reporting and periodic on-site financial exams, among many other types of regulation.

The state insurance departments also regulate the market conduct practices of insurers. They have hotlines that handle complaints from consumers and others that are unhappy with actions of their insurer. The insurance departments also monitor insurer's behavior in the marketplace and have a wide variety of actions that they can initiate ranging from meeting with the company to discuss perceived problems, data calls, interrogatories, desk audits to a scheduled on-site market conduct examination of the insurer.

Recognizing that not all otherwise qualified sureties have chosen to incur the cost and pay an NRSRO to obtain a rating and considering the sufficiency of insurance licensure, we recommend that the regulatory provision should not include an NRSRO rating requirement.

Second, the regulations regarding the condition of the bond seem to change the scope and nature of the condition contemplated by the Act. Section 6 of the Act (63 P.S. § 457.26) states that the bond shall secure the "faithful performance of the registrant's obligations under this act". (63 P.S. § 457.26(b)(2)(iii)(A)) This condition would suggest that the surety's obligations are triggered when there has been a demonstrable violation of the Act committed by the registrant. Further the surety usually could assert a defense if the registrant had not committed a violation. However, the proposed regulations define "faithful performance" only as payment of a civil penalty, restitution or costs of investigation. (49 Pa. Code 36.451(d)) Does the State Board of Certified Real Estate Appraisers intend to change the scope of the obligation of the bond and the surety's available rights and defenses? Is the surety required to pay any unpaid civil penalties, restitution or investigations costs without having the opportunity to address whether such amounts are justly due? If the revisions are intended to establish the bond simply as payment security that affords the surety no opportunity to contest whether a violation had occurred, bond availability may be limited.

Third, 49 Pa. Code 36.453(5) states that the bond is for the indemnification of claims that arise during the biennial licensure period. Does this provision require that a separate $40,000 apply to each licensure period, rather than a single bond amount available to all periods? Requiring a separate bond penalty for each period is contrary to 63 P.S. § 457.26(b)(2)(iv) (establishing an aggregate liability limitation) and would reduce the market availability of the bond.

We recommend that the regulations should state explicitly that the bond is a continuous bond that remains in effect until it is cancelled. Under a continuous bond, a single bond penalty is available to pay claims, regardless of the number of years the bond is in effect. A bond that is continuous avoids an accumulation of the bond penalty. (That is, a separate penalty is available for each license period. For example, a surety on a $40,000 bond that requires a separate bond penalty for each license period would be exposed to $120,000 of liability after the passage of three license periods.) Bonds that impose cumulative liability on the surety generally are not as widely available as bonds with a noncumulative penalty. The penal sum of the bond usually provides the surety certainty as to the maximum extent of its financial exposure. A requirement of a separate bond penalty for each license period carries no such certainty. The surety's maximum financial exposure is a function of the number of license periods that the bond is

covering, which is unknown at the time the bond is written initially. Increased uncertainty creates increased risk for the surety.

Finally, we note two provisions in the current bond form. The last paragraph of the form empowers any attorney to confess judgment against the surety and principal. Notably, the confession of judgment is not even linked to a default of the principal. Typically, a surety bond is a conditional obligation whereby the surety's obligations are triggered upon the default of the bond principal, which must be demonstrated by the obligee. As discussed above, the surety then should have the ability to counter these assertions with defenses that may be applicable, such as the offending conduct was outside the scope of the bond. A bond with a confess judgment provision could limit significantly the rights that are typically available to a surety. We recommend the deletion of this provision. At the very least, the bond should require the obligee to provide the surety notice before it exercises its rights under this provision.

The current form refers to § 13(c) of the Act. The Act does not seem to have a section 13. Please provide the code reference in the Pennsylvania Statutes to which "§ 13(c) of the Act" is referring.

These provisions could increase a surety's risk. A surety addresses the increased risk by tightening its underwriting requirements. As a result, fewer applicants can qualify for the bond. We would be happy to work with the State Board to develop a form that protects the Commonwealth's interests and would be available to qualified appraisers. Thank you for your consideration.

Sincerely,

Robert J. Duke