

**THE SURETY & FIDELITY ASSOCIATION OF AMERICA**

**MEMORANDUM**

**TO:** Government Affairs Advisory Committee

**FROM:** Lenore S. Marema

**DATE:** August 8, 2007

**RE:** Overview of the 110<sup>th</sup> Congress at the Summer Recess –Contract Surety

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Congress adjourned on August 6 for its summer recess. To date in the 110<sup>th</sup> Congress, there has been no final action on any issues impacting contract surety, but there are issues of interest pending in Congress. The following is a status report on SFAA's efforts regarding issues affecting contract surety. Congress reconvenes on September 4.

**Fiscal 2008 Appropriations**

The new Democratic leadership initially aimed to be the first Congress to complete the budget by July 4 and, later, to be the first Congress in a long time to complete the budget by the August recess. Now appropriations will be one of the first things that Congress needs to address and complete when it reconvenes, as there is still much work to be done. The 2008 fiscal year begins on October 1, and unless the budget gets done, continuing resolutions will be needed to avoid a shut down of the federal government.

The House passed all 12 of its appropriations bills; but at issue is a \$23 billion spending gap between what the House appropriated and what President Bush requested, and that gap is with the Pentagon appropriations bill being \$3.5 billion less than requested. The President has threatened vetoes of some of the appropriations bills. The House deliberately separated out spending for the war in Iraq and will take that up in September in a supplemental spending bill after the Administration gives Congress a new report on conditions in Iraq that is due on September 15.

By contrast, the Senate passed the fiscal 2008 Homeland Security bill on July 27 as the summer recess was approaching. This was the first appropriations bills to reach the Senate floor. It appears that the Senate is headed in the direction of the House, namely, passing bills that exceed the President's spending requests. The first item on the Senate's agenda when it returns is the Military Construction and Veterans' Affairs appropriations bill.

Conference committees likely will be needed to resolve differences in the House and Senate versions of some of the appropriations bills, and there will be some veto override votes. Both chambers are working to avoid a veto on many of the appropriations bills.

Earmarks have been in the spotlight this session. Early on in the session, the House changed its rules to require earmarks to be disclosed. Both the House and Senate passed new legislation,

introduced near the end of the session, which would require Senators to disclose earmarks they have sponsored and committee chairs to certify that earmarks have been disclosed 48 hours before a vote in the Senate on the bill or conference report containing the earmark. Failure of a Senator to properly disclose earmarks will open up the bill or conference report to a point of order. For the first time, Senators will be able to move on the Floor to eliminate earmarks added in a conference report that were in neither the original House or Senate bill.

### **Contract Surety Issues Pending in Congress**

—***Construction Spending.*** SFAA watches the appropriations bills for issues and trends in construction spending. Before Congress adjourned, it passed H.R. 3311, which authorizes up to \$250 million in emergency funds to replace the 35W bridge in Minneapolis. The bill includes \$5 million to address traffic problems around the disaster site. President Bush signed the measure into law. The funds for this will have to be appropriated when Congress returns.

Representative James Oberstar (D-MN), chair of the House Transportation Committee, plans to introduce legislation on the day Congress reconvenes to create a dedicated source of funding to repair or replace structurally impaired bridges nationwide. What level of funding will be included in the bill, and the source of the funding, remains to be seen. The Associated General Contractors (AGC) came out in strong support of this effort; and, most recently, the National Association of Manufacturers formed a Coalition for Improving America's Infrastructure, adding to the support for more, rather than less, spending in this area. Just prior to the Minnesota disaster, the Senate passed S. 775 to establish a commission to study the state of the nation's infrastructure and to report to Congress on what needs to be fixed.

Of note on construction spending, the House passed a \$104.2 billion Transportation-HUD appropriations bill. It allocates full funding for SAFETEA—LU, the federal highway bill. Overall, it is a \$1.1 billion increase over fiscal 2007 funding. Even if Congress passes full funding of SAFETEA—LU this year, the Bush Administration budget forecasters indicate that there will be a \$4 billion funding shortfall in 2009 to fully fund all the projects authorized under the federal highway law. The President threatened a veto of the Transportation-HUD appropriations bill as excessive spending, but that was before the Minnesota disaster and new initiatives for repairing the national infrastructure.

The House also passed H.R. 1495, the Water Resources Development Act, before the recess. It authorized \$21 billion for the Army Corps of Engineers water projects, much of which is for the Gulf Coast region. The Administration opposed both the House and Senate versions of this as too costly; and HR 1495, the consensus version, has several billion dollars more in spending than the separately passed versions.

—***SBA Reauthorization Act.*** Congress passed, and President Bush signed, H.R. 3206 to extend all programs of the Small Business Administration (SBA) until December 15. This is the third consecutive continuing resolution to keep the SBA in operation while Congress works to enact a long term revision and reauthorization of the Small Business Investment Act. Both chambers intend to address the SBA Reauthorization Act some time in the fall. Both appear to be taking up the issue of reauthorization of the Small Business Investment Act on a piecemeal basis, rather than in a comprehensive SBA Reauthorization Act.

Senator Olympia Snowe (R-ME) introduced S. 1960 on August 2, which is the Surety Bond Improvement Act of 2007. SFAA has worked closely with the Senate Small Business Committee majority and minority staffs, both last year and this year when the majority and minority reversed roles. The Senate bill addresses all of SFAA's major concerns with the SBA Program, as the Senate has proceeded largely on a bipartisan basis on this issue.

The U.S. Senate passed S.163, the Small Business Disaster Response and Loan Improvements Act of 2007. Among other things, the bill would provide that, for any procurement related to a major disaster, the SBA Administrator would be able to enter into commitments to guarantee any surety against loss resulting from a breach of the terms of a bid bond, payment bond, performance bond or the bonds posted in connection with the disaster, on any total work order or contract amount that would not exceed \$5,000,000 at the time of bond execution. Additionally, the bill would provide that, on the request of the head of any Federal agency other than the SBA that is involved in reconstruction efforts in response to a major disaster, the SBA Administrator would be able to guarantee any surety against loss on any total work order or contract amount that would not exceed \$10,000,000.

SFAA and AIA have been working with the majority staff of the House Small Business Committee, which also has been receptive to our concerns about the SBA Bond Guarantee Program. The House Committee, however, has been partisan and harder to move. We expect that the House bill will address many of our concerns in some fashion. The SBA provisions may go to a conference committee. To prepare for that event, the Government Affairs Advisory Committee will be asked at its September meeting to review the Senate bill and prioritize the items for purposes of input to the House and Senate staff for any conference committee.

**—Federal Withholding.** H.R.1023 would repeal the 3% withholding from federal government payments for goods or services, including construction costs, from every federal contract. The new law, enacted in 2006, is scheduled to become effective in 2011. The House Ways & Means Committee recently marked up legislation to delay implementation until 2012. The House also has legislation pending to repeal the 3% withholding. H.R.1023 currently has 188 co-sponsors and could be taken up in the fall. On the Senate side, however, there is less interest in addressing this issue. S. 777, which would repeal the withholding tax, has generated only nine co-sponsors.

**—Procurement Issues.** The new Democratic majority in the House has review of federal procurement procedures on its agenda, and some of the issues under consideration are of interest to SFAA. H.R. 1873, The Small Business Fairness in Contracting Act, passed the U.S. House. It is aimed at breaking down federal contracts into smaller sizes so that more small businesses can bid for them. The bill would create more transparency and consistency in monitoring the compliance of Federal contracting agencies with small business mandates and enhancing reporting and enforcement of the goals. Contract bundling and the track record of federal agencies meeting their set aside goals for awarding contracts to small businesses and businesses owned by disadvantaged groups has been the subject of several hearings. That issue is addressed from the contractors' perspective in H.R. 1873 in that it allows the general contractor to count small and emerging contractors at all levels in the project toward its goals for small business participation. H.R. 1873 has an uncertain future in the Senate at this point.

A clear part of the Democrats' agenda is to expose what they believe are failures of federal agency programs, to embarrass the current Administration and to be perceived as solving the

problems identified. Numerous hearings have been held, for example, on the SBA loan programs and how they responded to Hurricane Katrina. A consistent pattern in these hearings is that the Democratic Members of Congress present opening statements critical of some agency practice or policy, followed by witnesses discussing their problems. The witness for the agency in question, however, has been a relatively new staffer who has no knowledge of what has gone wrong in the past, but believes that the problems have been corrected and/or expresses willingness to address the issues raised in the hearing.

Representative Henry Waxman (D-CA) followed through with his promise to review federal procurement procedures, and H.R.1362, the Accountability in Contracting Act, has passed the House. It aims to limit the length of contracts for which there was no competitive bidding, minimize the number of sole source contracts, and maximize the number of fixed-price procurement contracts. S. 680 was introduced in the Senate and it deals with many of the same issues. No action has been taken on the bill yet.

### **Bills Recently Introduced**

The following bills of interest to contract surety have been introduced since our last federal report in June:

—*Veteran Owned Small Businesses*. S. 1784, a recently-introduced measure, would enact the Military Reservist and Veteran Small Business Reauthorization and Opportunity Act of 2007. The bill would require the President to establish an interagency task force within 90 days of the bill's enactment to coordinate the efforts of Federal agencies that would be necessary to increase capital and business development opportunities for, as well as increase the award of Federal contracting and subcontracting opportunities to, small business concerns that are owned and controlled by veterans and service-disabled veterans.

Among the duties of the task force, the bill would direct it to coordinate administrative and regulatory activities and develop proposals relating to increasing capital access and capacity of these small business concerns through loans, surety bonding and franchising. The task force also would be directed to the same towards increasing access to Federal contracting and subcontracting through the increased use of contract reservations, expanded mentor-protégé assistance and matching such small business concerns with contracting opportunities. The bill contains other duties for the task force as well, related to certification for these small business concerns.

The members of the task force would include the Administrator of the U.S. Small Business Administration (SBA), who would serve as chairperson of the task force, and a representative from the Department of Veterans Affairs, the Department of Defense, the SBA (in addition to the Administrator), the Department of Labor, the General Services Administration and the Office of Management and Budget, as well as four representatives from veterans-service organizations that the President would select.

### **Issues in Congress Affecting the Insurance Industry**

The natural catastrophe issue has dominated the insurance agenda in Congress. Some of the interest in Congress is backlash against the insurance industry, while some is industry-generated efforts to seriously address coverage for the enormous losses arising from natural disasters. The industry lobby in this session of Congress has been a series of tap dances. On one hand, most of

the industry opposes any federal role in insuring natural disasters, yet one of the industry's primary goals is the revision and extension of the Terrorism Risk and Insurance Act (TRIA) before it expires again at year's end. Many in Congress do not grasp the distinction that the risk of terrorism is uninsurable so that the private market will not respond, but that there is a robust market for coverage resulting from natural disasters, particularly if the private market is allowed to operate without burdensome regulatory intervention. The industry thinks that Representative Gene Taylor's (D-MS) bill – H.R. 990 – to expand the National Flood Insurance Program (NFIP) to cover wind losses would substantially exacerbate the potential deficits in that Program. Yet, the bill is hard to oppose with the private markets adjusting in the Gulf Coast region and insurers responding by reducing their writing, limiting coverage and increasing deductibles. Although it is DOA in this session, the optional federal charter (OFC) has been introduced in the House and Senate. It contains provisions that would limit the industry's antitrust immunity for federally-chartered insurers but keep it intact for state regulated companies. This creates the misperception that the industry is willing to "give up" McCarran for the OFC while the industry is united in opposition to the bills in the House and Senate Judiciary Committees to repeal McCarran. Similarly, the industry supports federal regulation by the Treasury Department while opposing regulation by the Federal Trade Commission under the pending antitrust bills.

The natural catastrophe issue appeared to be headed to a National Study Commission in this Congress, as this was the only action on which consensus seemed possible in both the House and the Senate. The Senate Banking Committee marked up S. 292, which is legislation creating such a commission. On the final day of the session, however, Florida Representatives Ron Klein (D-FL) and Tim Mahoney (D-FL) introduced H.R. 3355, the Homeowners Defense Act of 2007. The bill would create a non-profit Natural Catastrophe Risk Consortium, which would be a federal-state pool to buy reinsurance and sell catastrophe bonds on behalf of the participating states. The bill also would create a federal loan program to provide bridge loans to states to provide liquidity and to help respond to a catastrophic event. In essence, the bill provides a mechanism for the states to pool their resources to obtain reinsurance for natural catastrophes or to sell catastrophe bonds to raise revenue to pay for losses. The Consortium would be a quasi-public corporation. House Financial Services Committee (HFSC) Chair Barney Frank (D-MA) has indicated that there will be hearings on this approach in early September.

The House Financial Services Committee (HFSC) passed H.R. 2761, the Terrorism Risk Insurance Revision and Extension Act (TRIREA), before adjourning for the summer. It extends TRIA for 15 years with the current co-payments and deductibles. H.R. 2761 also makes some significant changes in coverage — expanding coverage to include domestic terrorism and covering risks from "weapons of mass destruction (nuclear, biological, chemical and radiological) — but also requires that such coverage must be "made available" and sets the program trigger at losses of \$50 billion. An HFSC subcommittee previously conducted a seven-hour hearing on its mark up. The White House strongly opposed the bill and threatened a veto. A Senate bill will be introduced after the summer recess.

HFSC also marked up H.R. 3121, Representative Taylor's multi-peril coverage bill for the NFIP, after defeating numerous amendments to derail it. The vote went down on a partisan basis.

The bills on the natural catastrophe commission, TRIA and the NFIP are expected to hit the floors of the House and Senate in late September or early October.

The activities and positions of the National Association of Insurance Commissioners (NAIC) remain puzzling on federal insurance issues. In testifying on H.R. 920, Rep. Taylor's multi-peril insurance bill to allow the National Flood Program (NFIP) to offer wind coverage, the NAIC did not oppose it. Instead, the NAIC suggested that the NFIP be structured more like a reinsurer so that issues regarding what caused the loss would be between the insurer and reinsurer, not the consumer. In the alternate, the private insurance market might offer an all-perils policy if there were a federal backstop or credit line that would cap and back the industry's losses. The NAIC also has wavered on opposition to repeal or amend McCarran-Ferguson.

### **Future Directions**

When Congress returns in the fall, it has a full agenda; but what gets done depends on how many Congressional legislative days are consumed with the appropriations bills, which need to be finished before the October 1 start of the new fiscal year, and the debate on the supplemental spending bill for the war in Iraq. At this point, it looks like Congress will be in session well into December.