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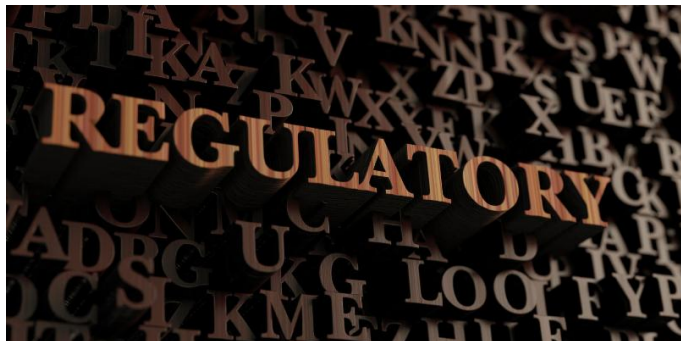
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Federal Regulatory Fall Agenda Released - Impacts Surety

Individual Sureties. The federal government recently released its fall regulatory agenda for federal agencies. The Department of Defense (DOD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA)

announced that they will propose revisions to the Federal Acquisition Regulation (FAR) so that individual sureties no longer can pledge real property, corporate stocks, corporate bonds, or irrevocable letters of credit. This would implement changes in the law that SFAA obtained in 2015 so that individual sureties can pledge only assets backed by the federal government. A proposed rule now is expected this month. The regulations needed to implement the new law have been delayed since late 2016.

ICE Regulation on Declining to Accept Bonds. SFAA sent comments opposing the proposed regulations from Immigration and Customs Enforcement (ICE) that would establish procedures for the Department of Homeland Security to decline a bond from a surety company. The proposal is based on regulations from the U.S. Treasury Department allowing all federal agencies to establish procedures for denying a bond from a Treasury listed surety, and ultimately having the surety delisted. The ICE rules deal only with declining a surety's bond and not delisting. ICE indicated it will issue a final rule



this month.

More Notices from the Agencies:

- The U.S. Small Business Administration plans to solicit information on how to streamline the existing Bond Guarantee Program and expects to issue an Advanced Notice of Proposed Rulemaking (ANPR) in this month. When the ANPR is released, SFAA will review it to determine if surety issues are involved.
- The Fiscal Service in Treasury gave notice of a proposed changes to its regulations governing surety companies to change how the assets and liabilities of sureties are valued. The regulations would address changes in the regulation of the surety industry occurring at the state and international levels. A proposed rule is expected to be issued in August 2019. SFAA and AIA are involved in an industry group that is working with the Fiscal Service on the credit for reinsurance requirements. SFAA has requested that Treasury modernize the regulations regarding Treasury listing so that Treasury's approach in providing credit for reinsurance is harmonized with the more liberal analytical approach of state departments of insurance.



SFAA and its Members Participate in Federal P3 Conference

Lee Covington and Robert Duke attended the P3 Federal Conference in Washington, DC last week. The Conference was an opportunity for stakeholders in the P3 sector to convene to discuss in a variety of sessions the political, financial, technical and legal considerations of public-private

partnerships. Among the key takeaways/highlights of the Conference regarding surety were:

- DJ Gribbin, former Special Assistant to the President for Infrastructure, discussed the role of the federal government in P3s. He noted that the federal government provides only 14% of the infrastructure spending, so that the state and local governments are the primary "asset owners." As such, Mr. Gribbin opined that the federal government should not be dictating the security package, even when federal funds are involved.
- During a session regarding insurance and P3s, a panelist remarked that the surety market has been slow to evolve. During the open discussion, Robert Duke commented that the industry has evolved in providing a relevant and responsive product that addresses the failed performance risk and the delayed performance risk that are critical to the P3 parties, including the rating agencies.
- Mary Jane Pethick of Zurich Surety hosted a roundtable discussion that presented the benefits of bonds.
- Jill Jamieson, Managing Director of JLL Public Institutions, provided her thoughts regarding the prospects for P3s with a divided Congress. She noted that the Democrat leadership has promised \$1 trillion in federal funding for infrastructure, which represents a stark difference in philosophy from the Trump Administration, which promised \$200 billion of federal funding. She noted that any infrastructure bill likely will be neutral on the use of P3s.

Senate EPW Committee Starts FAST Act Discussion

The Fixing America's Surface Transportation Act (FAST Act) will be in play in 2019 as it needs to be reauthorized in 2020. The Senate Environment and Public Works Committee conducted a hearing

last week on addressing America's surface transportation needs and it was clear that the Committee wants to push the reauthorization next year rather than wait until the Presidential election year.

Public agencies, represented by the American Association of Highway and Transportation Officials (ASHTO) and the contractors, represented by the Associated General Contractors (AGC), testified and presented talking points that have been

raised many times in the past. Congress needs to find a long-term solution to the financial problems of the Highway Trust Fund, and both groups supported an increase in the federal gas tax as the quickest and simplest fix. While the revenues generated will decline over time, Congress needs to invest in surface transportation now in a big way. Neither public owners nor contractors want any new programs, as the current formulas under the FAST Act for distributing funds work for both urban and rural areas. The time it takes to get a permit needs to be reduced. Within reason, states need to be given more flexibility in the use of federal highway funds.

The main problem also remains the same--\$90 billion is needed for a five-year reauthorization and \$114 billion is needed for six years.



Case Law Developments

SFAA reported the following cases during the week of November 26:

- In *Merchants Bonding Company v. Arkansas Construction Solutions*, the U.S. District Court for the Western District of Arkansas denied the defendant's motion to dismiss the surety's action to enforce an indemnity agreement.
- In *DC Mason Builders, Inc. v. Bancroft Construction Co.*, the U.S. District Court for the District of Maryland granted summary judgment in favor of the payment bond surety and prime contractor on account of claims releases provided by the subcontractor.
- In *Waverly City School District v. Triad AR Inc.*, the Ohio Court of Appeals held that an action against a prime contractor and its surety could proceed despite the fact that the amount of settlements with other defendants exceeded the costs to remedy the default.
- *United States ex rel. American Civil Construction, LLC v. Hirani Engineering & Land Surveying, P.C.*, is a Findings of Fact and Conclusions of Law in which the U.S. District Court for the District of Columbia found in favor of the claimant subcontractor against the surety on a Miller Act claim.

Members and case summary subscribers may obtain additional details regarding these cases on SFAA website (www.surety.org).

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