

The Surety & Fidelity Association of America

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July 13, 2011

Via Federal eRulemaking Portal

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1151 21st Street, NW
Washington, DC 20581

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-16-11
Proposed Rulemaking
Further Definition of “Swap”

Dear Ms. Murphy and Mr. Stawick:

The Surety & Fidelity Association of America (“SFAA”) is a trade association of approximately 450 companies that are licensed to provide surety and fidelity bonds. SFAA member companies collectively provide the vast majority of surety and fidelity bonds in the United States. We appreciate the opportunity to provide comment regarding the captioned notice of proposed rulemaking. Under the proposed rule, the Securities and Exchange Commission (“SEC”) and the Commodity Futures Trading Commission (“CFTC”) further define certain key terms, including “swap” and “security-based swap”, pursuant to Title VII of the Dodd-Frank Act. In general, we support the approach taken by the SEC and CFTC. However, for further clarity, we recommend that the SEC and CFTC proceed with its proposal to issue guidance that specifically enumerates insurance products, including surety and fidelity bonds, that are outside the statutory definitions of “swap” and “security based swap.”

In its comments to the Advance Notice of Proposed Rulemaking (75 FR 51429, August 20, 2010), SFAA expressed concern that the broad statutory definition could be misapplied to include financial products, such as insurance and surety bonds, that are clearly not swaps. In the captioned rulemaking, the SEC and CFTC indicated that there is “nothing in Title VII to suggest that Congress intended for insurance products to be regulated as swaps or security-based swaps.” 76 FR 29818, 29821, May 23, 2011. Thus products provided by state or Federally regulated insurance companies are not swaps if they meet the proposed rulemaking’s three criteria (the fourth criterion set forth in the rulemaking applies only to financial guaranty insurance):

1. requires that the beneficiary have an insurable interest that is the subject of the agreement and thereby carries the risk of loss with respect to that interest throughout the duration of the contract;
2. requires that loss occur and be proved and limits payment to the value of the insurable interest; and
3. is not traded separately from the insured interest on an organized market or over-the-counter.

The terms used in the rule’s criteria are different from the terms used with respect to a surety bond. For example, the bond is generally not referred to as a “policy.” In addition, the beneficiary of a bond typically is known as the “obligee.” Further, the bond’s limit is referred to as the “penal sum.” Nevertheless, the criteria can be applied to surety bonds and fidelity bonds, and such application would exclude bonds from the statutory definition of swaps.

For example, a contract surety bond secures the contractor’s obligation to the project owner that it will perform the project. A contract surety bond meets the criteria:

- The obligee has an interest in completion of the project and has a risk of default by the contractor.
- A default must occur and be demonstrated before the surety performs its obligations. Loss is paid up to the penal sum of the bond.
- Surety bonds are not traded.

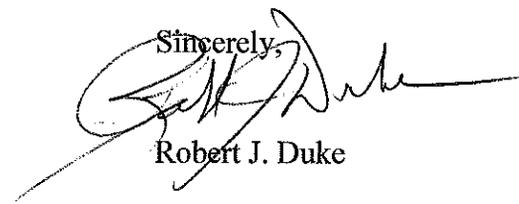
We are confident that the criteria applied to any type of surety or fidelity bond would indicate that surety and fidelity bonds are not swaps. However, rather than the need for a case by case analysis, greater certainty can be achieved if the SEC and CFTC implement the proposal to issue guidance specifically enumerating types of insurance products that are not swaps or security-based swaps. As noted in our comments to the Advance Notice of Proposed Rulemaking, surety bonds and fidelity bonds are insurance products issued by state regulated insurance companies. All states include surety and fidelity as lines of insurance subject to oversight. *See, e.g.* Cal. Ins. Code. § 12050, N.Y. Ins. Law § 1113(16) and 215 Ill. Comp. Stat. 5/4. The McCarran-Ferguson Act places insurance regulation firmly with the states. 15 U.S.C. § 1012. Section 722 of the Dodd-Frank Act states that swaps shall not be considered insurance and may not be regulated as insurance under state law. Although this provision is intended to carve out swaps from state regulation, the provision does not take away regulation of traditional insurance products,

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including surety and fidelity bonds, from the states. We recommend that the guidance issued by SEC and CFTC includes surety and fidelity bonds as products that do not fall under the statutory definition of swaps and security-based swaps.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Duke", written over the word "Sincerely,".

Robert J. Duke