

The Surety & Fidelity Association of America

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Via Federal eRulemaking Portal

United States Department of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
200 Constitution Avenue, NW
Room N-5655
Washington, DC 20210

**Re: Notice of Proposed Rulemaking
Definition of the Term “Fiduciary”
RIN 1210-AB32**

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 are provided to meet the bonding requirements of ERISA section 412 and related regulations (29 C.F.R. Part 2580) are provided by members of SFAA. SFAA submits the following comments to seek clarity regarding how the captioned proposed rulemaking would affect the scope of the bonding requirements under section 412.

ERISA section 412 and related regulations (29 C.F.R. Part 2580) generally require that every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan shall be bonded in order to protect employee benefit plans from the risk of loss caused by fraud and dishonesty on the part of persons who “handle” plan funds or other property. Such persons must be bonded for at least 10% of the amount of funds he or she handles, subject to a maximum bond amount of \$500,000 (\$1,000,000 for plans that hold employer securities).

It is our understanding, and confirmed by the Department of Labor Field Assistance Bulletin 2008-04 that the conduct of all fiduciaries need not be covered by a bond. Fiduciaries must be bonded only if they “handle” funds or other property of an employee benefit plan and do not fall within one of the exemptions in section 412 or the regulations.

Thus, the threshold in determining whether a person must be bonded is whether that person "handles" fund of the plan. 29 CFR 2580-412-6(a)(1) states:

A plan administrator, officer, or employee shall be deemed to be "handling" funds or other property of a plan, so as to require bonding under section 13, whenever his duties or activities with respect to given funds or other property are such that there is a risk that such funds or other property could be lost in the event of fraud or dishonesty on the part of such person, acting either alone or in collusion with others.

The regulations and Field Assistance Bulletin also establish criteria for a person handles funds:

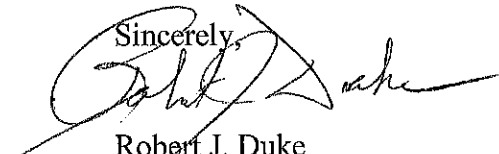
- physical contact (or power to exercise physical contact or control) with cash, checks or similar property;
- power to transfer funds or other property from the plan to oneself or to a third party, or to negotiate such property for value (e.g., mortgages, title to land and buildings, or securities);
- disbursement authority or authority to direct disbursement;
- authority to sign checks or other negotiable instruments; or
- supervisory or decision-making responsibility over activities that require bonding

We seek confirmation that the broadened definition of a fiduciary as proposed in the captioned rulemaking does not create a new class of persons that must be bonded. Please confirm that the functions set forth in the proposed definition under 29 CFR 2510.3-21, without more, are not sufficient to satisfy the criteria for "handling" funds necessary to trigger the bonding requirement.

In addition, section 412 of ERISA and the regulations found in 29 C.F.R. Part 2580 contain exemptions from ERISA's bonding requirements. Section 412 specifically excludes any fiduciary (or any director, officer, or employee of such fiduciary) that is a bank or insurance company and which, among other criteria, is organized and doing business under state or federal law, is subject to state or federal supervision or examination, and meets certain capitalization requirements. ERISA § 412(a)(3). Section 412 also excludes from its requirements any entity which is registered as a broker or a dealer under section 15(b) of the Securities Exchange Act of 1934, if the broker or dealer is subject to the fidelity bond requirements of a "self-regulatory organization". ERISA § 412(a)(2). Please confirm whether the expanded definition of fiduciary affects the exemptions from bonding set forth in section 412 of ERISA and related regulations.

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We believe that the requested clarification will assist our members and their insureds in determining how the proposed rulemaking will affect the section 412 bond requirements. Thank you for your consideration.

Sincerely,

Robert J. Duke
Corporate Counsel