From: Duke, Rob <RDuke@surety.org>
Sent: Monday, September 20, 2010 3:57 PM
To: rule-comments@sec.gov; dfadefinitions <dfadefinitions@CFTC.gov>
Subject: S7-12-10 Definitions (Title VII of Dodd-Frank Act
Attach: 20100920152315826.pdf

Attached are comments of The Surety & Fidelity Association of America

Robert J. Duke
Director of Underwriting/Assistant Counsel
The Surety & Fidelity Association of America
202-778-3630

The Surety & Fidelity Association of America

1101 CONNECTICUT AVENUE, NW, SUITE 800, WASHINGTON, DC 20036 TEL: (202) 463-0600 – FAX: (202) 463-0606
website: http://www.surety.org
E-mail: information@surety.org

September 20, 2010

Via Electronic Mail

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 S7-12-10
Advance notice of proposed rulemaking
Definitions Contained in Title VII of Dodd-Frank Act

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 advance notice of proposed rulemaking. As 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, we recommend that the SEC and CFTC should clarify that "swap" does not include surety or fidelity bonds and other property-casualty insurance policies that are under the jurisdiction of state insurance departments.

Sections 721 and 761 of the Dodd-Frank Act contain rather broad definitions of a "swap" including "any agreement . . . that provides for any purchase, sale, payment, or delivery . . .that is dependent on the occurrence . . . of an event or contingency associated with a potential financial, economic, or commercial consequence." This definition is so broad, that it could be misapplied to include financial products that are clearly not swaps. For example, a surety bond is the promise to answer for the default of another. 74 Am. Jur. 2d Suretyship § 11. A common example of a surety bond is a performance bond written to secure the performance of a construction contract. All states and the federal government (per 40 U.S.C. §§ 3131 *et seq.*) require that public construction above a certain threshold in contract size be bonded. Under a performance bond, if the contractor materially breaches the construction contract, the surety must remedy the default, such as by paying the project owner for the excess costs of completion. Bonds may also secure a financial obligation. For example, a Customs Bond, required by U.S. Customs and Border Protection under 19 CFR Part 113, secures an importer's obligation to pay its fines and duties. If the importer fails to pay what is owed, the surety must pay under the bond.

Certainly, surety and other types of property-casualty insurance are not swaps, and Dodd-Frank did not contemplate undertaking the regulation of surety and other insurance, which has long been subject to state regulation. It is well established that surety is a type of insurance. All states include surety as a line 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, including surety bonds, from the states. Given the breadth and ambiguity of the definition of swaps, clarification is needed that surety bonds and other types of property-casualty insurance are not "swaps" as contemplated by the statute.

Thank you for your consideration.

Sincerely,

Robert J. Duke