

## August 3, 2007 Follow-up on regulation of surety industry

Mr. Morris Chavez  
Superintendent of Insurance  
NM Public Regulation Commission  
1120 Paseo de Peralta  
Santa Fe, NM? 87504-1269

**Re:** Request for Opinion — Follow-up on Regulation of Surety Industry

Dear Superintendent Chavez:

We are in receipt of your February 28, 2007 letter wherein your office requested our advice regarding the New Mexico Public Regulation Commission Insurance Division's ("Division") interpretation of the requirements of the New Mexico Insurance Code ("Code") for the surety bond industry. Our office previously issued an advisory letter on this topic on September 18, 2006 to New Mexico State Senator James Taylor. According to your request: "We agree with that [AGO] letter and have taken the position that all sureties whether corporate or individual must apply for and receive a license before they transact business in the state of New Mexico." Nevertheless, you now request: (a) a formal Attorney General Opinion letter (and not an advisory letter) on this topic; (b) affirmation of the position taken in the advisory letter; (c) clarification that the advisory letter addressed the situation of an individual helping out a family member; and (d) clarification of the situation where an individual uses a direct cash deposit and not a surety bond.

For several reasons, we do not believe it is necessary to issue a formal opinion addressing the same topic as our previous advisory letter. First, the September 18, 2006 advisory letter, although issued during the previous administration, remains in effect unless and until it is modified or withdrawn by the current administration. Second, it is our understanding that none of the relevant laws cited in the September 18, 2006 advisory letter were amended during the 2007 legislative session. Therefore, the advisory letter's research and conclusions are still relevant. Third, the advisory letter did address the situation of an individual attempting to help out family members. The letter stated that every person must receive a license, but the "only likely exception is if an individual is acting in a one-time situation (i.e. doing it for a family member in a one-time emergency situation) and thus not in the 'business' of doing these transactions."

Finally, the advisory letter did not address the situation of an individual who uses a direct cash deposit rather than a surety bond because the two transactions are completely different. A surety performance bond is a term of art and means: "A contractual arrangement between the surety, the principal and the obligee whereby the surety agrees to protect the obligee if the principal defaults in performing the principal's contractual obligations. The bond is the instrument which binds the surety." Black's Law Dictionary, 125 (6th ed. 1991). This is in contrast to a direct cash deposit made between

parties. Thus, we agree with the position stated in your request that the Division "would not regulate a direct cash deposit situation."

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY SHANDLER  
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General