

## September 18, 2006 Regulation of Surety Industry

Honorable James Taylor  
N.M. State Senate  
3909 Camino Del Valle SW  
Albuquerque, NM 87105

Re: **Request for Opinion – Regulation of Surety Industry**

Dear Senator Taylor:

You have 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. It is our understanding that the Division's interpretation is that every person in the surety bond business must receive a certificate of authority prior to operating in New Mexico. Your letter stated that this interpretation should be examined in the context of the passage of Senate Bill 814 in 2005. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us, we agree with the Division's interpretation.

There are two rules of statutory construction that apply to this matter. First, a statute should be read according to its plain, written meaning. See Wilson v. Denver, 125 N.M. 308, 314, 961 P.2d 153 (1998). Second, "[a] fundamental rule of statutory construction is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent." Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241 (1992).

The Code, in this topic area, is written in plain language. An insurer "includes every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance." NMSA 1978, § 59A-1-8 (1984) (emphasis added). Indeed, "no person shall act as an insurer, and no insurer shall transact insurance in this state ... unless so authorized by a subsisting certificate of authority issued by the superintendent [of Insurance]..." NMSA 1978, § 59A-5-10 (1984).

Senate Bill 814 stated: "A subcontractor shall provide a performance and payment bond on a public works building project if the subcontractor's contract for work to be performed on a project is fifty thousand dollars (\$50,000) or more." NMSA 1978, § 13-1-148.1 (2005). It is our understanding that the law has potentially created an increased number of parties that need surety bond insurance. However, it did not amend any requirements found in the Code.

The Division has informed us that Maryland is the only state with a code that allows parties to sell surety bonds without having a state certificate of authority. There is no such exception in New Mexico or Senate Bill 814. The law reads that "every person

engaged ... in the business of entering into contracts of insurance” is subject to the code. NMSA 1978, § 59A-1-8 (1984) (emphasis added).<sup>1</sup>

Your letter also asks about the role of the federal government. The federal General Services Administration has informed the Division, and we find no legal basis to dispute their conclusion, that federal insurance law does not preempt the Code requirements. Therefore, if a federal entity, such as Los Alamos National Laboratory, has accepted a surety bond, it does not mean the insurer is exempt from the Code requirements. As far as New Mexico is concerned, every person in the business must have a certificate from the Division.

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: Stuart Bluestone, Chief Deputy Attorney General  
Karen Risku, PRC Insurance Division counsel

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[1] The only likely exception is if an individual is acting in an one-time situation (i.e. doing it for a family member in an one-time emergency situation) and thus not in the “business” of doing these transactions.