The Tennessee Advisory Commission on Intergovernmental Relations

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MEMORANDUM

TO: Commission Members

FROM: Lynnisse Roehrich-Patrick
Executive Director

DATE: 21 August 2013

SUBJECT: Background on Insurance versus Surety Bonds Legislation

Senate Bill 624 by Senator Norris [House Bill 1004 by Todd], which was sent to the Commission by the Senate State and Local Government Committee, proposed changing the current law to allow insurance as an option to an individual surety bond. The committee specifically asked the Commission to study whether insurance would be a suitable alternative to public official surety bonds.

The bonding of public officials in Tennessee has a long history, with some surety bond requirements for public officials established in the 19^{th} century. Tennessee law requires various local government officials to execute individual surety bonds in order to hold office. These bonds are used to protect against loss caused by a public official not faithfully performing official duties. Most positions requiring surety bonds are in county government. Only two city government positions require surety bonds; however there are also some surety bond requirements in city charters. There are no individual surety bond requirements for state officials, though there are laws mandating blanket coverage for state officials and employees. This coverage is provided by an insurance policy.

Terminology

Laws requiring individual surety bonds appear in several parts of the Tennessee Code Annotated,[1] covering 28 different offices of local government. This coverage is a prerequisite to taking office. Terminology in current law is inconsistent, sometimes even within a single statute, and may be confusing at best or misleading at worst. For example, Tennessee's statute addressing a city manager's surety bond refers in some places to it as a fidelity bond,

[1] Titles 5, 6, 7, 8, 9, 13, 18, 49, 54, and 67 of the Tennessee Code Annotated each contain surety bonding requirements for public officials.

though it is not one.[2] It's unclear whether this is the cause or the result of inconsistent use in the bond and insurance industries. For clarity, more precise meanings of the terms are given below:

- **Public Official Bond (or Official Bond)**: a broad term used to describe required coverage for a public official, traditionally used to enforce the faithful performance of official duties, and to indemnify the public against official delinquency.[3]
- **Surety Bond:** a contract between three parties in which one party (the surety bond seller) guarantees a second party (the obligee, the city or county) the successful performance of a third party (the principal, the public official):
    1. Surety: This is the company selling the surety bond, typically an insurance company. The surety is one who agrees to pay money or to do any other act in the event that the principal fails to perform the obligations of the bond. "One bound with his principal for the payment of a sum of money or for the performance of some duty or promise and who is entitled to be indemnified by someone who ought to have paid or performed if payment or performance be enforced against him."[4]
    2. Obligee: the recipient of the obligation. It is the party to whom a guarantee is made. In our context, the governmental entity, such as a county or city, would be the obligee.
    3. Principal: this is the public official—the person whose performance is covered by the bond.
- **Insurance:** a two party contract that transfers the risk of loss from one party to another in exchange for payment (premium).
- **Blanket Bond:** this term is often used to describe insurance policies, which are not really bonds at all. Even in Tennessee law, this term is used to describe insurance policies that cover multiple officials or employees. For example, insurance policies are actually used where the law requires a "blanket surety bond."[5]
- **Fidelity Bond:** while called bonds, they are actually insurance policies designed to cover the risk of loss caused by dishonesty. Typically, the insurer agrees in the contact to "indemnify another against a loss arising from the want of honesty, integrity, or fidelity of an employee or other person holding a position of trust."[6] In short, they cover loss due to any dishonest act of a covered employee.

[2] Tennessee Code Annotated, Section 6-21-104.
[3] 21 Tennessee Jurisprudence Public Officers Section 7.
[4] Black's Law Dictionary 1441 (6th ed. 1991).
[5] Ibid.
[6] 35A American.Jurisprudence.2nd edition. Fidelity Bonds & Insurance Section 1(2005).

- **Bond Amount:** also called the penal sum, this term refers to the maximum amount that the surety will pay if the principal does not meet the obligations of the bond. Minimum bond amounts are set by statute in Tennessee for positions requiring individual surety bonds.

Current Law

Tennessee's statutes requiring public official bonds give guidance on

- the officials required to give bond,
- the coverage and amount of the bond,
- the process for approval of the bonds, including the approval authority,
- the financial responsibility for paying the cost of the bonds, and
- the ramifications of not providing a required bond.

In Tennessee, the surety bond process is regulated at every step. Chapter 19 "Bond of Officers" of Title 8 provides the general bond requirements, procedures, and authority for the issuance of the bonds. State law requires that the forms for official bonds be prescribed by the Comptroller of the Treasury, with the approval of the Attorney General and Reporter.[7] This requirement is to ensure that the proper form and legal language in the bond will be used to guarantee adequate and standardized coverage for governmental entities. Tennessee statutes also generally require that the governmental entity pay for the bond. Surety bonds are typically sold by insurance companies, which are regulated by the Department of Commerce and Insurance.

Tennessee Code Annotated, Section 8-19-106, provides that "the respective counties shall pay the premiums for such bonds and the registration fees." Statutes also generally require that the official must be bonded before taking office. For example, the statute for the county trustee states in part that "the county trustee may enter upon the discharge of the duties of office, after first giving bond, and an oath for the faithful performance of the duties of the office."[8] And if the bond is not executed within the prescribed time, then the individual vacates the office.[9]

Amount of Bond

Tennessee statutes requiring individual surety bonds for public officials generally set minimum bond amounts of coverage that must be provided by the surety. The statutes make clear that it is only a minimum and that local governments can require higher bond amounts. Public Chapter 315 , Acts of 2013, increased the bond amounts for many officials. Bond amounts are

[7] Tennessee Code Annotated, Section 8-19-101(b)(1).
[8] Tennessee Code Annotated, Section 8-11-102.
[9] Tennessee Code Annotated, Section 8-19-117.

determined a few different ways: revenue based calculations, population based, court determination, county legislative body or presiding judge determination, and often simply set at a specific amount. For certain positions that handle large sums of money, the minimum bound amount is based on a revenue calculation. For example, a county trustee's minimum bond amount "shall be based on the revenues as follows: (1) Four percent (4%) up to three million dollars ($ 3,000,000) of the funds collected by the office; (2) Two percent (2%) of the excess over three million dollars ($ 3,000,000) shall be added; and (3) The amounts indicated in subdivisions (b)(1)-(2) shall be cumulative." The bond amounts for some county trustees are several million dollars. Furthermore, city charters often have surety bonding requirements for certain officers and employees who handle money. The charters usually require the bond amounts to be set by a city legislative body or board.

Table 1: Public Officials and Their Bond Amounts

Office/Agency	TCA Reference	Amount of Bond	Elect/Appoint
Assessor of Property	67-1-502 & 505	$50,000	Elect - 4 years
Chancery Court Clerk & Master	18-2-201 thru 213 & 18-5-101	$50,000-$100,000 (pop base)	Appoint - 6 years
Circuit/Criminal/Special/Gen. Sess. Clerk	18-2-201 thru 213 & 18-4-101	$50,000-$100,000 (pop base)	Elect - 4 years
Commissioner/Receiver	18-2-201 thru 213	Court determined	
Constable	8-10-101 &106	$4,000 to $8,000 (County discretion)	Elect - 4 years
Coroner	8-9-101 & 103	$2,500	County Bd. Elect - 2 years
County Clerk	18-2-201 thru 213/18-6-101 thru 115	$50,000-$100,000 (pop base)	Elect - 4 years
County Engineer	54-9-131 & 132	$10,000	Employ by Road Comm.
County Executive/Mayor	5-6-101 & 109	$100,000	Elect - 4 years
County Road Commission	54-8-101 & 54-9-116 & 119	Set by Co. Leg. Body	Elected - 1, 2 or 3 years
County Highway/Bridge Funds	54-4-103 (c)	$100,000 or greater	
County Highway Superintendent	54-7-105 and 108	$100,000	Elect - 4 years
Development District	13-14-114	Reasonable based on revenues	
Director of Accounts & Budgets (1957 Act)	5-13-103	$100,000	County Mayor Appt.
Director of Finance (1981 Act)	5-21-106 & 109	$100,000	Finance Comm. Appt.

Office/Agency	TCA Reference	Amount of Bond	Elect/Appoint
E911 District	7-86-119	Revenue based - Calculation Formula	
Human Resource Agency	13-26-110	Reasonable based on revenues	
LEA/Fiscal Agent	49-3-315(b)(3)	Revenue based - Calculation Formula	
Notary Public	8-16-101 thru 104	$10,000	County Bd. Elect - 4 years
Process Server	8-8-108	$5,000(Shelby $15,000)	Judicial appointment
Purchasing Agent	5-14-103(c)	$100,000	County Mayor Appt.
Register of Deeds	8-13-101 thru 103	$50,000-$100,000 (pop base)	Elect - 4 years
Sheriff	8-8-103	$100,000	Elect - 4 years
Special Deputy	8-8-303	$50,000	Appointed by Sheriff
Superintendent of Schools	49-2-301 & 9-3-301(c) & 49-2-102	$50,000	Appoint by Board of Education
Surveyor	8-12-101 & 102	$2,000	County Bd. Elect - 2 years
Trustee	8-11-101 thru 103	Revenue based - Calculation Formula	Elect - 4 years
City Manager (and employees dealing with funds)	6-21-104 & 105	Set by ordinance of board of commissioners, except where the amount is prescribed in charter.	Appoint by Board of Commissioners
All city officers/employees dealing with funds (Modified City Manager-Council Charter)	6-35-411	Council sets the bond amount and determines who must have one.	

Cost

The price of a surety bond depends on the bond amount required, the obligations the bond covers, and the relevant background of the individual being bonded. Surety companies have specific underwriting guidelines for determining the price of the bond. Typically, personal credit history, criminal background, and prior bonding history all go into determining the price paid for a bond. The higher the bond amount, the higher the price for that bond. For example, based on information provided by Williamson County, a $50,000 bond for a county clerk cost $113, while a near $10 million bond for the county trustee cost the county approximately $6,000.

Coverage

To fully understand what a public official surety bond covers in Tennessee, one should: (1) analyze the bond; (2) analyze the statute calling for the bond's issuance; (3) analyze any statutes governing the conduct of the bonded official; and (4) analyze the applicable case law.[10] Tennessee has a required public official bond form provided on the Comptroller of the Treasury's website. The bond form provided by the Comptroller of the Treasury's office is attached. The statutes on public official bonds require the bond forms to have specific legal phrases that obligate the principal and surety. The language of the surety bond obligations that must be covered in the bond is provided in Tennessee Code Annotated at Section 8-19-111(b):

> "That if the _______ (Principal) shall:
>
> 1. Faithfully perform the duties of the Office of _______County during such person's term of office or continuance therein; and
>
> 2. Pay over to the persons authorized by law to receive them, all moneys, properties, or things of value that may come into such principal's hands during such principal's term of office or continuance therein without fraud or delay, and shall faithfully and safely keep all records required in such principal's official capacity, and at the expiration of the term, or in case of resignation or removal from office, shall turn over to the successor all records and property which have come into such principal's hands, then this obligation shall be null and void; otherwise to remain in full force and effect."

The key obligation in the bond is for the principal to "faithfully perform duties of the office." This phrase has great significance in determining coverage. The most common-sense meaning of faithfully performing duties would mean an officer or employee has performed his or her official duties without dishonesty, malfeasance, or negligence. Faithful performance of duty requires an official to do his or her job so that all duties required of the position are successfully

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[10] Shreves, H. Bruce, and Charles C. Coffee. 1997. "Faithful Performance Under Fidelity, Public Official and Statutory Bonds", *III Fidelity Law Association Journal*: 97-113.

completed without any associated damage to the obligee. And the lack of faithful performance means the failure to do one's job—whether intentionally or negligently.[11] This term, along with the bond contract, obligates the surety to pay up to the bond amount for any lack of faithful performance of duties by the principal. In a public official bond, "faithful performance" is what the correlating statute defines it to be.[12] Part 2 of the bond form, generally speaking, obligates the official to be responsible for all money, property, and records.

The duties that must be faithfully performed by bonded individuals are found in the statutes that describe the office held by that individual. For example, Tennessee Code Annotated, Section 8-11-104, lists several specific duties for county trustees. Other officials have similar statutes detailing the duties of office. Tennessee has a statute that broadly outlines the obligations covered by required official bonds at Section 8-19-301:

> Every official bond executed under this code is obligatory on the principal and sureties thereon: (1) For any breach of the condition during the time the officer continues in office or in the discharge of any of the duties of such office; (2) For the faithful discharge of the duties which may be required of such officer by any law passed subsequently to the execution of the bond, although no such condition is expressed therein; (3) For the use and benefit of every person who is injured, as well by any wrongful act committed under color of such officer's office as by the failure to perform, or the improper or neglectful performance, of the duties imposed by law.

Some officials also have specific statutes addressing the scope of liability on the bonds, such as the county clerk: "the official bonds of clerks, executed under this code, are obligatory on the principal and sureties for every wrongful act or failure of duty in the clerk's official capacity, whether embraced in the condition of the bond or not, or growing out of a law passed subsequently to its execution." Case law also provides insight into what events or acts of the official will be covered.

Claims against Surety Bonds

Tennessee law provides that "sureties on the bonds of public officials shall be liable for the principal sum in default and covered by the bond and for interest thereon, at the rate of ten percent (10%) per annum for the period of delinquency, and not otherwise." Surety bond claims are rare and unexpected because of the strict screening process required. To have a claim against a bond, the governmental entity has to show a loss. When a claim is made, the surety investigates and, if it is a valid claim, will pay and then turn to the official for reimbursement.

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[11] Price, Jeffrey, Dennis McDonnell, and Rebecca Howald, "The Public Officials Bond." *The Fidelity Law Association Journal* VII (2006): 151-201.
[12] Ibid. at 162.

Insurance as a Substitute for Individual Surety Bonds

Senate Bill 624, as introduced, would allow any governmental entity to purchase insurance instead of an individual surety bond to cover crimes and employee dishonesty and "insure the faithful performance by officials and their employees of their fiduciary duties and responsibilities." The minimum limit would be set at $400,000 per occurrence. A certificate of insurance would "satisfy all requirements for the filing of the official bonds by the named officials."

The cost of an insurance policy used to replace and replicate the coverage provided by surety bonds for public officials is not currently known. Since insurance has not been used for risk management of individual public officials in Tennessee, at best, only an estimate could be made on the cost of initial premiums. Insurance agents and state officials interviewed have indicated that the initial premiums would be set high because there is no market experience in Tennessee with this particular type of insurance product. Even so, the fiscal note on the bill indicated that insurance may increase tort liability, but "there should be a recurring decrease in local government expenditures because the cost associated with insurance policies are deemed less expensive than the cost associated with surety bonds." The fiscal note goes on to say that "insurance policies may ultimately be less expensive, but insurance comes with coverage limits and deductibles."

While there are similarities between insurance and surety bonds, there are also many differences. Bonds make people individually accountable; insurance would not. A surety bond will not be issued until the individual has been investigated, and the price of the bond will depend on what the investigation reveals. In fact, the bonding company may refuse to issue a bond if they consider the risk too great. In other words, everything depends on the individual.

With insurance, individuals are not investigated; the experience of the entire organization is considered instead. The insurance premium is based on that experience and the amount of coverage desired or required. Moreover, individuals are not subject to any particular requirements under a blanket insurance policy. Unlike individual surety bonds, insurance assumes losses will occur and is a mechanism to set money aside to cover them.

Insurance is written in favor of the insurance company, with many exclusions and exemptions. Surety bonds are written in favor of the governmental entity as broadly defined in the law specifying the duties of the office covered.

Table 2. Comparison of Surety Bond and Insurance

Surety Bond	Insurance
Three party agreement. The surety guarantees the faithful performance of the principal to the obligee.	Two party agreement. The insurance company agrees to pay the insured directly for certain losses incurred.
Losses not expected. The surety takes only those risks which its underwriting experience indicates is safe. A surety will usually look at the applicant's credit, arrest and, bankruptcy history, as well as any previous bond claims made against the applicant.	Losses expected. Insurance rates are adjusted to cover losses and expenses as the law of averages fluctuates.
Losses recoverable. After a claim is paid, the surety expects to recoup its losses from the principal. This means the public official has "skin in the game," and the risk of loss stays with the official.	Losses usually not recoverable. When an insurance company pays a claim, it usually doesn't expect to get repaid by the insured. Risk of loss is transferred to the insurance company.
The cost of the bond covers expenses. A large portion of the surety bond price is really a service charge for weeding out unqualified candidates and for issuing the bond.	Premium covers losses and expenses. Insurance premiums are collected to pay for expected losses.
Sureties are selective.	Insurers write most risks. The insurance agent generally tries to write a policy on anything that comes along (at the appropriate premium rate) and allows for a large volume to cover the risk.
2 or 3 page document	Often a multipage document containing many exclusions and exemptions
Written in favor of the state. Statute requires that the bond form be "prescribed by the Comptroller of the Treasury, with the approval of the Attorney General and Reporter."[13]	Typically, written in favor of the insurance company.

[13] Tennessee Code Annotated, Section 8-19-101(b)(1).

Surety Bond	Insurance
$ Amount of Coverage: Bond amounts vary from $2,000 to well over $10 million depending on the applicable statutory requirements for the position. For some officials, this is a specific amount as stated in the law. For other officials the amount is based on the amount of local revenues or on population. And for some, the amount of the bond is determined by the legislative body or presiding judge.	$ Amount of Coverage: Senate Bill 624 proposes that "any such policy shall have limits of not less than $400,000 per occurrence."
Tennessee's official bonds allow any injured party to recover on the bond. Part (3) of 8-19-301: states that official bonds under this code are "for the use and benefit of every person who is injured, as well by any wrongful act committed under color of such officer's office as by the failure to perform, or the improper or neglectful performance, of the duties imposed by law." Official bonds are not issued for the protection of the official himself, but rather to protect the government or the public from any injuries caused by the public official while in office.	Third party may not bring suit. Policy usually written to only allow recovery for the insured. That is, the policy is written for the sole benefit of the insured, the governmental entity.

Surety Bond	Insurance
Coverage: The statues contains two basic obligations: (1) that the principal faithfully discharge or perform the duties of his office; and (2) that he truly account for and turn over public money, property, and records entrusted to him by his duties of office. The public official bond covers the failure of the bonded official to carry out either one of these duties with the motives of the official being irrelevant. A breach of the bond can occur as the result of the failure to act, negligence of the principal, or intentional conduct, i.e., nonfeasance, misfeasance, and malfeasance. In essence, the failure to faithfully discharge one's duties may be attributed to either failing to take a required act or failing to refrain from doing something which by its nature should not have been done. Provided that loss occurs to one entitled to recover on a bond, all liability on a public official bond is absolute and is predicated on breach of duty.	Coverage: In theory, insurance could cover everything that the bond covers. Senate Bill 624 proposes allowing the optional use of a policy of insurance or an agreement with an administrative agency or pool established pursuant to Tennessee Code Annotated, Section 29-20-401, that provides government crime coverage, employee dishonesty insurance coverage, or equivalent coverage that insures the faithful performance by officials and their employees of their fiduciary duties and responsibilities.

Source: CNA Surety. 2012. "Suretyship: A Practical Guide to Surety Bonding," http://www.cnasurety.com/services/pdf/Suretyship.pdf (accessed July 1, 2013).

States Allowing Insurance in lieu of Surety Bonds

Some other states use insurance in place of surety bonds for the risk management of public officials. In 1988, Arkansas mandated a more limited form of coverage through a program called the "Self-Insured Fidelity Bond Program." This mandatory program replaced the previously required surety bonding of public officials, and acts as a blanket insurance policy covering losses caused by dishonesty for all government officials and employees in the state up to $250,000 per incident. The Arkansas system provides a more limited form of coverage than Tennessee's individual surety bonds.

Idaho also has set up programs to provide optional insurance coverage in lieu of surety bonds. They have one system at the state level covering all officials and employees that is similar to Tennessee's state blanket policy. They also have an optional program for counties and cities. Idaho's coverage, on both the state and local levels, is an insurance policy and provides broader coverage than Arkansas' program.

SURETY'S BOND NO.________________

STATE OF TENNESSEE
COUNTY OF ________________
OFFICIAL STATUTORY BOND
FOR
COUNTY PUBLIC OFFICIALS
OFFICE OF ____________________

KNOW ALL MEN BY THESE PRESENTS:

That ______________________________________ of ____(City or Town), County of _______________________ Tennessee, as Principal, and ____ as Surety, are held and firmly bound unto THE STATE OF TENNESSEE in the full amount of ____Dollars ($___________________) lawful money of the United States of America for the full and prompt payment whereof we bind ourselves, our representatives, successors and assigns, each jointly and severally, firmly and unequivocally by these presents.

WHEREAS, The said Principal was duly ___elected ____appointed to the office of ______________________________ of and for ______________________County for the ___ year term beginning on the ____day of ___________, 2______ and ending on the _____day of ________________, 2_______.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH:

That if the said ____, Principal, shall:

1. Faithfully perform the duties of the office of ________________________________of _______________________ County during such person's term of office or his continuance therein; and,
2. Pay over to the persons authorized by law to receive them, all moneys, properties, or things of value that may come into such Principal's hands during such Principal's term of office or continuance therein without fraud or delay, and shall faithfully and safely keep all records required in such Principal's official capacity, and at the expiration of the term, or in case of resignation or removal from office, shall turn over to the successor all records and property which have come into such Principal's hands, then this obligation shall be null and void; otherwise to remain in full force and effect.

WITNESS our hands and seals this ____________day of ____________________, 2_____.

WITNESS – ATTEST:

____

COUNTERSIGNED BY:

____

Tennessee Resident Agent

PRINCIPAL:

____

SURETY:

by:____________________________________

____

____

(Attach evidence of authority to execute bond)

ACKNOWLEDGEMENT OF PRINCIPAL

STATE OF TENNESEE
COUNTY OF _______________________

Before me, a Notary Public, of the State and County aforesaid, personally appeared ______________________________, to me known (or proved to me on the basis of satisfactory evidence) to be the individual described in the foregoing bond as Principal, and who, upon oath acknowledged that such individual executed the foregoing bond as such individual's free act and deed.

Witness my hand and seal this ______day of ______________________, 2_______.

My Commission Expires:

_____________________________, 2______.

____
Notary Public

(over)

CT-0467 (Rev 07-13) RDA 903

ACKNOWLEDGEMENT OF SURETY

STATE OF ______________________________
COUNTY OF ____________________________

Before me, a Notary Public, of the State and County aforesaid, personally appeared ____________________________ with whom I am personally acquainted and, who, upon oath, acknowledged himself/herself to be the individual who executed the foregoing bond on behalf of ______________________________, the within named Surety, a corporation duly licensed to do business in the State of Tennessee, and that he/she as such individual being authorized so to do, executed the foregoing bond on behalf of the Surety, by signing the name of the corporation by himself/herself as such individual.

Witness my hand and seal this ______day of ________________________, 2______.

My Commission Expires:

___________________________, 2_______.

____
Notary Public

APPROVAL AND CERTIFICATION

SECTION I. (Applicable to all County Officials except Clerks of all Courts)

Bond and Sureties approved by ___________________________, County Executive/Mayor of ___________________ County, on this _____day of __________________, 2 ______.

Signed:

____
County Executive/Mayor

CERTIFICATION:

I, _________________________________, County Clerk of ______________________County, hereby certify that the foregoing bond was approved by the Legislative Body of said county, in open session on the _____day of ________________, 2_____, and entered upon the minutes thereof.

Signed:

____
County Clerk

SECTION II. (Applicable to all Clerks of all Courts)

CERTIFICATION:

This is to certify that I have examined the foregoing bond and found the same to be sufficient and in conformity to law, that the sureties on the same are good and worth the penalty thereof and that the same has been entered upon the minutes of said court.

Signed:

____
Judge of the ________________ Court of and for said County on this ______day of ________________, 2_____.

SECTION III. (Applicable to all County Officials' Bonds)
FOR USE BY REGISTER OF DEEDS

SECTION IV. (Applicable to all County Officials Bonds)

ENDORSEMENT:

Filed with the Office of the County Clerk, County of ______________________, this ____day of _______________, 2_____

Signed:

____
County Clerk

Form Prescribed by the Comptroller of the Treasury, State of Tennessee
Form Approved by the Attorney General, State of Tennessee

CT-0467 (Rev 07-13)