

Proposed Rules

Federal Register

Vol. 76, No. 52

Thursday, March 17, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21, 119, 121, 125, 135, 141, 142, and 145

[Docket No. FAA-2009-0671; Notice No. 09-06A]

RIN 2120-AJ15

Safety Management System; Withdrawal

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Advance notice of proposed rulemaking (ANPRM); withdrawal.

SUMMARY: The FAA is withdrawing a previously published advance notice of proposed rulemaking (ANPRM) that solicited public comment on a potential rulemaking requiring certain 14 Code of Federal Regulations (CFR) part 21, 119, 121, 125 135, 141, 142, and 145 certificate holders, product manufacturers, applicants, and employers (“product/service providers”) to develop a Safety Management System (SMS). The FAA is withdrawing the ANPRM because we have issued a notice of proposed rulemaking that would require certificate holders operating under 14 CFR part 121 to develop and implement an SMS. The FAA may initiate additional rulemaking in the future to consider SMS for other product/service providers.

DATES: The advance notice of proposed rulemaking (ANPRM) published on July 23, 2009 (74 FR 36414) is withdrawn as of March 17, 2011.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Scott Van Buren, Chief System Engineer for Aviation Safety, Office of Accident Investigation and Prevention (AVP), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 494-8417; facsimile: (202) 267-3992; e-mail: scott.vanburen@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

On July 23, 2009, the FAA published an advance notice of proposed rulemaking (ANPRM) (Notice No. 09-06, 74 FR 36414). The ANPRM solicited public comment on the appropriate scope and applicability of a potential rulemaking that would require air carriers, aircraft design and manufacturing organizations, and maintenance repair stations to develop an SMS that would provide the organization’s management with a set of robust decision-making tools to use to improve safety. The FAA received 89 comments in response to the ANPRM. The comment period closed on October 21, 2009.

The *Airline Safety and Federal Aviation Extension Act of 2010* (Pub. L. 111-216) directed the FAA to issue an NPRM within 90 days of enactment of the Act, and a final rule by July 30, 2012. The Act requires the FAA to develop and implement an SMS for all part 121 air carriers. The NPRM was published on November 5, 2010 (75 FR 68224).

The FAA also chartered the Safety Management System Aviation Rulemaking Committee (ARC) (Order No. 1110.152; February 12, 2009) to solicit recommendations from industry experts on the issue of SMS, including the ANPRM. On March 31, 2010, the ARC submitted its report to the FAA.

As a result of the legislative mandate to issue a final rule implementing Safety Management Systems for part 121 air carriers by July 2012, the FAA has decided not to immediately address SMS for other product/service providers. The SMS ARC will complete its task with submittal of comments on the part 121 SMS rulemaking by the close of comment date, March 7, 2011. Further tasks of this ARC are not anticipated. However, the FAA reiterates its commitment to SMS and may decide to establish other advisory committees or industry panels in the future to provide recommendations that may lead to SMS rulemaking for other product/service providers.

A copy of the Committee report, the NPRM and comments received thus far can be found in the docket for this rulemaking.

Reason for Withdrawal

The FAA is withdrawing Notice No. 09-06 to redirect its resources to

complete the SMS for part 121 final rule by the 24 month deadline of July 30, 2012. Although the NPRM is limited to part 121 operators, the general requirements in our proposed part 5 were designed so in the future, they could be adapted and applied to other FAA-regulated entities, such as part 135 operators, part 145 repair stations, and part 21 aircraft design and manufacturing organizations. The FAA is committed to developing SMS where it will improve safety of aviation and aviation related activities.

Conclusion

Withdrawal of Notice No. 09-06 does not preclude the FAA from issuing another proposal on this subject in the future nor does it commit the agency to any future course of action. The public will be provided the opportunity for public comment on any future rulemaking through the notice and comment process. Therefore, the FAA withdraws Notice No. 09-06, published at 74 FR 36414 on July 23, 2009.

Issued in Washington, DC, on March 11, 2011.

Margaret Gilligan,

Associate Administrator for Aviation Safety.

[FR Doc. 2011-6255 Filed 3-16-11; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 223

RIN 1510-AB27

Surety Companies Doing Business With the United States

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Notice of proposed rulemaking with request for comment.

SUMMARY: The Department of the Treasury, Financial Management Service (Treasury), administers the Federal corporate surety program. Treasury issues certificates of authority to qualified sureties to underwrite and reinsure Federal bond obligations. We are proposing to amend our regulation to clarify the circumstances when an agency bond-approving official can decline to accept a bond underwritten by a Treasury-certified surety. We are

also proposing to amend the procedures to be used by Treasury in adjudicating any complaint received from an agency requesting that a surety's certificate be revoked for failure to satisfy an administratively final bond obligation due the agency.

DATES: Comments on the proposed rule must be received by May 16, 2011.

ADDRESSES: The Financial Management Service participates in the U.S. government's eRulemaking Initiative by publishing rulemaking information on <http://www.regulations.gov>.

Regulations.gov offers the public the ability to comment on, search, and view publicly available rulemaking materials, including comments received on rules.

Comments on this rule, identified by docket FISCAL-FMS-2010-0001, should only be submitted using the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions on the Web site for submitting comments.

- **Mail:** Rose Miller, Manager, Surety Bond Branch, Financial Management Service, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

The fax and e-mail methods of submitting comments on rules to FMS have been retired.

Instructions: All submissions received must include the agency name ("Financial Management Service") and docket number FISCAL-FMS-2010-0001 for this rulemaking. In general, comments will be published on Regulations.gov without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Rose Miller, Manager, Surety Bond Branch, Financial Management Service, at (202) 874-6850 or rose.miller@fms.treas.gov, or James J. Regan, Senior Counsel, Financial Management Service, at (202) 874-6680 or james.regan@fms.treas.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Treasury is responsible for administering the corporate Federal surety bond program under the authority of 31 U.S.C. 9304-9308 and 31 CFR part 223 (part 223). Congress delegated to Treasury the discretion to issue a certificate if Treasury decides the surety's articles of incorporation

authorize it to engage in the business of surety, the corporation has the requisite paid-up capital, cash, or equivalent assets, and the corporation is able to carry out its contracts. Treasury evaluates the qualifications of sureties to write Federal bonds and issues certificates of authority to those sureties that meet the specified corporate and financial standards. Treasury publishes the list of certified sureties in Department Circular 570 which is available online at <http://www.fms.treas.gov/c570>. Federal bond-approving officials consult and rely on this list whenever a corporate surety bond is presented to an agency because bonds underwritten by Treasury-certified sureties satisfy bonding requirements, provided such bonds are accepted by agency bond-approving officials.

Treasury finds it necessary to clarify the circumstances under which a Federal agency bond-approving official can decline to accept a bond underwritten by a Treasury-certified surety. Federal agencies have sometimes continued to accept bonds from a certified surety, even when the surety owes the agency an administratively final bond obligation, believing that Treasury certification mandates such acceptance in all cases. This is not the case.

The proposed rule would clarify that Treasury certification does not insulate a surety from the requirement to satisfy administratively final bond obligations in order to ensure that its bonds will be accepted by agencies in all cases. Specifically, under the proposed rule, an agency bond-approving official would have the discretion to decline to accept bonds underwritten by a Treasury-certified surety for cause, such as when the surety owes the agency an unpaid or unsatisfied bond obligation that is administratively final under agency procedures. This discretion is not without limit. Before declining to accept bonds from a Treasury-certified surety, an agency must provide the surety advance written notice stating: (i) The intention of the agency to decline bonds underwritten by the surety, (ii) the reasons for or cause of the proposed non-acceptance of such bonds, (iii) the opportunity for the surety to rebut the stated reasons or cause, and (iv) the surety's opportunity to cure the stated reasons or cause. Under the proposed rule, the agency may decline the bonds underwritten by the certified surety if, after consideration of any submission by the surety, the agency issues a written determination that the bonds should be declined. The agency is required to articulate standards for exercising its

discretion to decline bonds from Treasury-certified sureties in an agency rule or regulation prior to declining any bonds in specific cases.

The proposed rule is consistent with the general and permanent surety laws that were enacted by Congress and later codified, without substantive change, as 31 U.S.C. 9304(b). The surety statutory framework is derived from public laws enacted in 1894 and 1910. The Act of August 13, 1894, 28 Stat. 279, as amended by The Act of March 23, 1910, 36 Stat. 241, provided that a bond underwritten by a Treasury-certified surety satisfied bonding requirements "Provided, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same." This *proviso* conditioned acceptance of a bond on the approval by an agency. This language was first codified in 1925 as 6 U.S.C. 6, and codified again in 1982 as 31 U.S.C. 9304(b), without substantive change. See, e.g., *The Code of the Laws of the United States of America*, December 7, 1925, Preface Statement (The codification is the official restatement of the general and permanent laws of the United States, and under the codification "No new law is enacted and no law repealed"); Public Law 97-258 (1982), 96 Stat. 877, 1047 (Codification enacted "without substantive change").

Federal courts have affirmed that Section 9304(b), and its predecessor derivations, afford agency bond-approving officials discretion to decline the acceptance of a bond underwritten by a Treasury-certified surety, consistent with the due process standards articulated in the proposed rule. See *Concord Casualty & Surety Co. v. United States*, 69 F.2d 78, 81 (2d Cir. 1934) (The bond-approval official's approval of a bond underwritten by a Treasury-certified surety "is not mandatory" but calls for the exercise of wise discretion); *American Druggists Ins. Co. v. Bogart*, 707 F.2d 1229, 1233 (11th Cir. 1983) ("The surety's approval by the Secretary of the Treasury * * * does not preclude the district court from exercising its discretion to approve only those [bail] bonds which it feels confident will result in the defendant's presence at trial" and "*Section 9304(b)* impliedly authorizes this discretion in its provision that 'each surety bond shall be approved by the official of the Government required to approve or accept the bond.'").

The proposed text is also consistent with 31 U.S.C. 9305(d)(3) which authorizes Treasury to require

additional security in circumstances when the surety is no longer sufficient. Specifically, Treasury believes the discretion afforded to agency bond-approving officials under the proposed text is appropriate because a surety that has not paid an administratively final bond obligation to an agency, even after due process has been afforded, is no longer providing sufficient security vis-à-vis the agency.

The proposed rule is necessary to better facilitate the prompt resolution of bond disputes between Federal agencies and sureties. Under the current rule, the status of Treasury certification has had the unintended consequence of inhibiting the proper adherence to agency administrative processes in bond dispute matters. In practice, this has negatively impacted the ability to resolve administratively final bond obligation disputes at the agency level. In a limited number of cases, sureties appear to have simply ignored agency final decisions for extended periods of time. While these cases are anomalous and rare, they represent an unwelcome burden on the Treasury and the public fisc because the administratively final bond obligations at issue were not paid, or resolved, promptly.

Thus, the proposed rule would clarify that agencies have two options when experiencing surety performance and collection problems. *First*, an agency owed an administratively final bond obligation by a certified surety has the discretion to decline acceptance of additional bonds underwritten by such surety, *provided* the due process standards articulated in the rule are satisfied. *Second*, an agency owed an administratively final bond obligation by a certified surety can submit a complaint to Treasury requesting that the surety's certificate be revoked.

With regard to this second option, the proposed rule would clarify the procedures and standard of review that will be used by Treasury to adjudicate any complaint submitted by an agency to Treasury requesting that a surety's certificate be revoked for failure to satisfy an administratively final bond obligation. Under the proposed rule, Treasury will not conduct a *de novo* review of the administratively final agency determination that a bond obligation is past due because substantive agency bond obligation determinations are based, in large part, on the interpretation and application of laws that the agency, rather than Treasury, has been tasked by Congress with administering. Treasury will not substitute its judgment for that of the agency in determining whether a bond obligation is owed under agency

authorities. Rather, in considering whether the surety's certificate should be revoked, Treasury will review whether the agency's administratively final decision (that the surety owes a past-due bond obligation) was reasonable, based on a consideration of relevant factors, and did not involve a clear error of judgment.

To the extent that a surety requests Treasury to conduct an informal hearing before reaching its decision on whether the surety's certificate should be revoked, the proposed rule clarifies that the formal adjudication standards under the Administrative Procedures Act, 5 U.S.C. 554, 556, and 557, do not apply to the conduct of such an informal hearing. This is appropriate because Treasury's surety statutes, 31 U.S.C. 9304–9308, do not require a formal adjudication to be determined on the record after an opportunity for a hearing. *See, e.g.*, 5 U.S.C. 554(a)(formal adjudication procedures only apply in cases "required by statute to be determined on the record after an opportunity for an agency hearing"). Moreover, a surety's property interest in its certificate is narrow. *American Druggists Ins. Co. v. Bogart*, 707 F.2d 1229, 1235 (11th Cir. 1983) ("The scope of the surety's protected interest arising from the federal regulatory scheme is indeed narrow."). Given this narrow interest, the opportunity for a surety to request an informal hearing under the standards articulated in the proposed rule is consistent with due process requirements that the surety be given an opportunity to be heard "at a meaningful time and in a meaningful manner." *See, e.g., Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)(Fundamental due process satisfied if the individual is given an opportunity to be heard "at a meaningful time and in a meaningful manner").

In addition, Treasury is proposing to make certain technical amendments to part 223 to update statutory citations and to provide current Treasury point of contact information.

II. Section-by-Section Analysis

Section 223.1

We are proposing to amend § 223.1 by stating, in plain language, that part 223 governs the issuance and revocation of certificates of authority of surety companies to do business with the United States as sureties on, or reinsurers of, Federal surety bond obligations, and the acceptance of such obligations. The proposed rule deletes archaic language and clarifies that the U.S. Department of the Treasury, Financial Management Service (Treasury), acts on behalf of the

Secretary of the Treasury in performing these duties.

Section 223.2

We are proposing to amend § 223.2 to clarify that applications for certificates of authority should be submitted to Treasury at the location, and in the manner, specified online at <http://www.fms.treas.gov/c570>, as amended from time to time.

Section 223.3

Section 223.3(a) establishes the requirements that must be met by an applicant company in order to be issued a certificate of authority by Treasury. Proposed § 223.3(a) restates such requirements in plain language. In addition, the proposed regulation clarifies that any certificate issued by Treasury is expressly subject to the continuing compliance by the surety with all statutory requirements and the other conditions referenced in this part.

Section 223.4

Section 223.4 provides that no company will be issued a certificate of authority by Treasury unless it maintains on deposit with the insurance commissioner of the State in which it is incorporated, or other specified State official, legal investments having a current market value of not less than \$100,000, for the protection of claimants, including the surety's policyholders in the United States. Proposed § 223.4 would add a sentence requiring a company to submit to Treasury with its initial application for a certificate of authority, and annually thereafter, a written statement signed by the State official attesting to the current market value of the deposit (not less than \$100,000) and that the legal investments remain on deposit with the State.

Section 223.8

Section 223.8 requires Treasury-certified sureties to file annual and quarterly financial reports to Treasury for review. Proposed § 223.8(a) updates the specified Treasury official to whom these reports should be submitted.

Section 223.9

Section 223.9 establishes the criteria by which Treasury values the assets and liabilities of a company for certificate of authority purposes. Section 223.9 provides that Treasury will allow credit for reinsurance in all classes of risk if the reinsuring company holds a certificate of authority from Treasury, or has been recognized as an admitted reinsurer by Treasury. Proposed § 223.9 clarifies that this credit for reinsurance

will be allowed only if the reinsurer is in continuing compliance with all certificate of authority requirements.

Section 223.11

Section 223.11(b) provides that a surety can underwrite a Federal bond in excess of its underwriting limitation if the excess amount is reinsured by a company holding a certificate of authority issued by Treasury, provided the specified reinsurance requirements are met. Proposed § 223.11(b) clarifies that the requisite reinsurance bond forms are available on the General Services Administration Web site at <http://www.gsa.gov>.

Section 223.12

Section 223.12 establishes the application requirements and standards for a company to be recognized by Treasury as an admitted reinsurer (except on excess risks running to the United States) for surety companies doing business with the United States. When a Treasury-certified surety cedes non-Federal risks to an admitted reinsurer, Treasury will credit the surety for the ceded reinsurance when valuing its assets and liabilities, provided applicable requirements are met. Proposed § 223.12 updates the specified Treasury official to whom applications and reports pertaining to admitted reinsurer status should be submitted.

Section 223.16

Proposed § 223.16, List of certificate holding companies, adds a new fourth sentence to this subpart providing: "Bonds underwritten by certified companies on the Department Circular No. 570 list may be presented to an agency bond-approving official for acceptance." Proposed § 223.16 adds a final sentence to this subpart providing: "Selection of a particular qualified company from among all companies holding certificates of authority is discretionary with the principal required to furnish the bond, but the acceptance of a bond by an agency bond-approving official is subject to § 223.17."

This proposed text clarifies that Treasury-certified sureties have the opportunity to present their bonds to an agency bond-approving official for acceptance, but that the actual acceptance of a bond by an agency bond-approving official is subject to proposed § 223.17.

Section 223.17

Proposed § 223.17, Acceptance and non-acceptance of bonds, clarifies that every surety holding a Treasury-issued certificate of authority has the

opportunity to present its bonds to an agency bond-approving official for acceptance, and that such bond-approving official may accept such proffered bonds in all cases. It also clarifies, however, that an agency bond-approving official has the discretion to decline bonds underwritten by a Treasury-certified surety for cause, provided the specified due process protections are satisfied. The agency is required to articulate standards for exercising its discretion not to accept bonds from Treasury-certified sureties in an agency rule or regulation prior to declining any bonds in specific cases. Existing agency rules or regulations that substantially comply with, or that are consistent with, the requirement to articulate standards in advance meet the requirements of this paragraph.

Under proposed § 223.17, for cause is primarily defined to mean that a surety has not paid or satisfied an administratively final bond obligation due the agency. The articulation of this primary definition is not intended to preclude an agency from articulating additional "for cause" reasons, provided such reasons are defined in an agency rule or regulation in advance, and such additional reasons are otherwise consistent with an agency's own authorities. See, e.g., 27 CFR 25.101 (Existing Treasury Tax and Trade Bureau (TTTB) regulation authorizing rejection of a bond for substantive reason consistent with that agency's mission; under § 25.101, TTTB can disapprove a bond if the surety has been convicted of any fraudulent noncompliance with any provision of law of the United States related to internal revenue or customs taxation of distilled spirits, wines, or beer).

The authority of an agency to decline the acceptance of bonds "for cause" under this proposed paragraph would not apply when the for cause basis, e.g., the obligation of the surety to satisfy administratively final bond obligations owed the agency, has been stayed or enjoined by a court of competent jurisdiction.

Section 223.18

Proposed § 223.18, Revocation, clarifies that revocation of a surety's certificate of authority by Treasury can occur in two ways. First, Treasury can initiate a revocation proceeding on its own initiative under proposed § 223.19, Treasury initiated revocation proceedings, when it has reason to believe that a surety is not complying with 31 U.S.C. 9304–9308 and/or the regulations under part 223. Second, Treasury can initiate a revocation proceeding under proposed § 223.20,

Revocation proceedings initiated by Treasury upon receipt of an agency complaint, upon receipt of a complaint from an agency that a surety has not satisfied an administratively final bond obligation.

Section 223.19

Proposed § 223.19, Treasury initiated revocation proceedings, outlines the process by which Treasury initiates proceedings on its own accord to revoke a surety's certificate of authority for failure to meet the requirements of 31 U.S.C. 9304–9308 and/or part 223. These proceedings can be initiated due to a failure to meet financial strength requirements or any other requirement.

Section 223.20

Proposed § 223.20, Revocation proceedings initiated by Treasury upon receipt of an agency complaint, specifies the process for an agency to submit a complaint to Treasury requesting that a certified surety's certificate of authority be revoked for failure to satisfy an administratively final bond obligation. Proposed § 223.20 affords the surety the opportunity to demonstrate its qualifications to retain its certificate, establishes the roles of the Treasury Reviewing Official and the Treasury Deciding Official in the adjudicative process, and establishes the standard of review to be used by the Reviewing and Deciding Officials in reaching a decision.

The Treasury Reviewing and Deciding Officials will not conduct a de novo review of the agency's administratively final determination that a bond obligation is past due because substantive agency bond obligation determinations are based, in large part, on the interpretation and application of laws that the complaining agency, rather than Treasury, has been tasked by Congress with administering. The Treasury Reviewing and Deciding Officials will not substitute their judgment for that of the agency. Rather, in reviewing whether revocation is justified, Treasury will consider whether the agency's final decision (that the surety owes a past-due bond obligation) was reasonable, based on a consideration of relevant factors, and did not involve a clear error of judgment.

As a general rule, proposed § 223.20 anticipates that Treasury will adjudicate agency complaints without an informal oral hearing. Proposed § 223.20(c) ensures that the surety is afforded a fair opportunity to demonstrate, in writing, its qualifications to retain its certificate before a decision is reached. Nevertheless, in the event a surety

believes the opportunity to make known its views is inadequate, it may request that Treasury convene an informal hearing before reaching a decision under the timeframes established in the proposed rule. Proposed § 223.20(h) specifies the procedures under which such an informal hearing would be conducted.

In the event that the Treasury Deciding Official sustains the agency's complaint and makes a decision that the surety's certificate should be revoked, proposed § 223.20 clarifies that a surety will be afforded an opportunity to cure the noncompliance to avoid decertification, unless its noncompliance is "willful." Proposed § 223.20(g) articulates the scope and application of the willful exception to the cure opportunity.

Section 223.21

Proposed § 223.21, Reinstatement, provides that a surety whose certificate of authority has been revoked, or not renewed, by Treasury can apply for reissuance of a certificate of authority after one year. Among other things, such a surety must demonstrate as a condition of reinstatement that the basis for the non-renewal or revocation of its certificate has been eliminated. Under proposed § 223.21 the determination of whether the basis for the non-renewal or revocation has been eliminated or effectively cured will be made by Treasury in its discretion.

DERIVATION CHART FOR REVISED PART 223

Old section	New section
—	223.17
223.17	223.18
—	223.19
223.18	223.20
223.19	223.20
223.20	223.20
223.21	223.21
223.22	223.22

III. Procedural Analyses

Request for Comment on Plain Language

Executive Order 12866 requires each agency in the Executive branch to write regulations that are simple and easy to understand. We invite comment on how to make the proposed rule clearer. For example, you may wish to discuss: (1) Whether we have organized the material to suit your needs; (2) whether the requirements of the rules are clear; or (3) whether there is something else we could do to make these rules easier to understand.

Regulatory Planning and Review

The proposed rule does not meet the criteria for a "significant regulatory action" as defined in Executive Order 12866. Therefore, the regulatory review procedures contained therein do not apply.

Regulatory Flexibility Act Analysis

It is hereby certified that the proposed rule will not have a significant economic impact on a substantial number of small entities. Treasury-certified sureties already have an existing obligation to make payment on bond obligations to ensure acceptance of their bonds by agency bond-approving officials under 31 U.S.C. 9304(b). The proposed rule merely codifies this existing obligation in the regulation and clarifies that Federal agencies can decline to accept bonds underwritten by Treasury-certified sureties in limited circumstances, primarily when the surety owes the agency an administratively final bond obligation. In addition, Treasury-certified sureties have an existing obligation to make payment on bond obligations or be subject to Treasury certificate revocation proceedings. The proposed rule merely clarifies the procedures and standard of review that will be used by Treasury in adjudicating revocation complaints submitted by agencies. Payment disputes involving Treasury-certified sureties are anomalous and rare. The proposed rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. We have determined that the proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement or

specifically addressed any regulatory alternatives.

List of Subjects in 31 CFR Part 223

Administrative practice and procedure, Surety bonds.

For the reasons set out in the preamble, we propose to amend 31 CFR part 223 as set forth below:

PART 223—SURETY COMPANIES DOING BUSINESS WITH THE UNITED STATES

1. Revise the authority citation for part 223 to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 9304–9308.

2. Revise § 223.1 to read as follows:

§ 223.1 Certificate of authority.

The regulations in this part will govern the issuance by the Secretary of the Treasury, acting through the U.S. Department of the Treasury, Financial Management Service (Treasury), of certificates of authority to bonding companies to do business with the United States as sureties on, or reinsurers of, Federal surety bonds (hereinafter "bonds" or "obligations") under the authority of 31 U.S.C. 9304–9308 and this part, and the acceptance of such obligations. The regulations in this part also govern the revocation of certificates.

3. Revise § 223.2 to read as follows:

§ 223.2 Application for certificate of authority.

Every company wishing to apply for a certificate of authority shall submit an application to the Financial Management Service, U.S. Department of the Treasury, c/o Surety Bond Branch, to the location, and in the manner, specified online at <http://www.fms.treas.gov/c570>, as amended from time to time. In accordance with 31 U.S.C. 9305(a), the data will include a copy of the applicant's charter or articles of incorporation and a statement, signed and sworn to by its president and secretary, showing its assets and liabilities. A fee shall be transmitted with the application in accordance with the provisions of § 223.22(a)(i).

4. In § 223.3, revise paragraph (a) to read as follows:

§ 223.3 Issuance of certificates of authority.

(a)(1) A company submitting an application to be issued a certificate of authority by Treasury to underwrite and reinsure Federal surety bonds must include all required data and information, as determined by Treasury

in its discretion, for the application to be complete and ready for review. Upon receipt of a complete application, Treasury will evaluate the submission to determine whether the applicant company:

(i) Is duly authorized under its charter or articles of incorporation to conduct the business referenced under 31 U.S.C. 9304(a)(2);

(ii) Has paid-up capital of at least \$250,000 in cash or its equivalent;

(iii) Is solvent and financially and otherwise qualified to conduct the business referenced under 31 U.S.C. 9304(a)(2); and

(iv) Is able and willing to carry out its contracts. In making the determination whether a company meets these requirements, Treasury will evaluate the application as a whole, the required financial statement(s) submitted by the company, the company's charter or articles of incorporation, the past history of the company, and any further evidence or information that Treasury may require the company to submit (at the company's expense).

(2) If Treasury determines, in its discretion, that the applicant company meets all of these requirements, Treasury will issue a certificate of authority to the company authorizing it to underwrite and reinsure Federal bonds. The certificate of authority will be effective for a term that expires on the last day of the next June. All such statutory requirements and regulatory requirements under this part are continuing obligations, and any certificate is issued expressly subject to continuing compliance with such requirements. The certificate of authority will be renewed annually on the first day of July, *provided* the company remains qualified under the law, the regulations in this part, and other pertinent Treasury requirements, *and* the company submits the fee required under § 223.22 by March 1st of each year to the address and/or account specified by Treasury.

* * * * *

5. In § 223.4, add a sentence to the end of the section to read as follows:

§ 223.4 Deposits.

* * * The company shall submit to Treasury with its initial application for a certificate of authority, and annually thereafter, a written statement signed by such State official attesting to the current market value of the deposit (not less than \$100,000) and that the legal investments remain on deposit with the State under the terms specified.

6. In § 223.8, revise paragraph (a) to read as follows:

§ 223.8 Financial reports.

(a) Every such company will be required to file with the Assistant Commissioner, Management, or incumbent Treasury executive, on or before the last day of January of each year, a statement of its financial condition made up as of the close of the preceding calendar year upon the annual statement blank adopted by the National Association of Insurance Commissioners, signed and sworn to by its president and secretary. On or before the last days of April, July and October of each year, every such company shall file a financial statement with the Assistant Commissioner, Management, or incumbent Treasury executive as of the last day of the preceding month. A form is prescribed by the Treasury for this purpose. The quarterly statement form of the National Association of Insurance Commissioners when modified to conform to the Treasury's requirements, may be substituted for the Treasury's form. The quarterly statement will be signed and sworn to by the company's president and secretary or their authorized designees.

* * * * *

7. In § 223.9, revise the last sentence to read as follows:

§ 223.9 Valuation of assets and liabilities.

* * * Credit will be allowed for reinsurance in all classes of risks if the reinsuring company holds a certificate of authority from the Secretary of the Treasury, *provided* such reinsuring company is in continuing compliance with all certificate of authority requirements, or has been recognized as an admitted reinsurer in accord with § 223.12.

8. In § 223.11, revise paragraph (b)(1) to read as follows:

§ 223.11 Limitation of risk: Protective methods.

* * * * *

(b) *Reinsurance.* (1) In respect to bonds running to the United States, liability in excess of the underwriting limitation shall be reinsured within 45 days from the date of execution and delivery of the bond with one or more companies holding a certificate of authority from the Secretary of the Treasury. Such reinsurance shall not be in excess of the underwriting limitation of the reinsuring company. Where reinsurance is contemplated, Federal agencies may accept a bond from the direct writing company in satisfaction of the total bond requirement even though it may exceed the direct writing company's underwriting limitation. Within the 45 day period, the direct writing company shall furnish to the

Federal agency any necessary reinsurance agreements. However, a Federal agency may, at its discretion, require that reinsurance be obtained within a lesser period than 45 days, and may require completely executed reinsurance agreements to be provided before making a final determination that any bond is acceptable. Reinsurance may protect bonds required to be furnished to the United States by the Miller Act (40 U.S.C. 3131, as amended) covering contracts for the construction, alteration, or repair of any public building or public work of the United States, as well as other types of Federal bonds. Use of reinsurance or coinsurance to protect such bonds is at the discretion of the direct writing company. Reinsurance shall be executed on reinsurance agreement forms: Standard Form 273 (Reinsurance Agreement for a Miller Act Performance Bond), Standard Form 274 (Reinsurance Agreement for a Miller Act Payment Bond), and Standard Form 275 (Reinsurance Agreement in Favor of the United States for other types of Federal bonds). These Standard Forms are available on the General Services Administration Web site at <http://www.gsa.gov>.

* * * * *

9. In § 223.12, revise paragraph (a) introductory text, paragraph (a)(5), paragraph (b) introductory text, and paragraph (c) to read as follows:

§ 223.12 Recognition as reinsurer.

(a) *Application by U.S. company.* Any company organized under the laws of the United States or of any State thereof, wishing to apply for recognition as an admitted reinsurer (except on excess risks running to the United States) of surety companies doing business with the United States, shall file the following data with the Assistant Commissioner, Management, or incumbent Treasury executive, and shall transmit therewith the fee in accordance with the provisions of § 223.22:

* * * * *

(5) Such other evidence as Treasury may determine is necessary to establish that it is solvent and able to meet the continuing obligation to carry out its contracts.

(b) *Application by a U.S. branch.* A U.S. branch of an alien company applying for such recognition shall file the following data with the Assistant Commissioner, Management, or incumbent Treasury executive, and shall transmit therewith the fee in

accordance with the provisions of § 223.22:

* * * * *

(c) *Financial reports.* Each company recognized as an admitted reinsurer shall file with the Assistant Commissioner, Management, or incumbent Treasury executive, on or before the first day of March of each year its financial statement and such additional evidence as the Secretary of the Treasury determines necessary to establish that the requirements of this section are being met. A fee shall be transmitted with the foregoing data, in accordance with the provisions of § 223.22.

10. Revise § 223.16 to read as follows:

§ 223.16 List of certificate holding companies.

A list of qualified companies is published annually as of July 1 in Department Circular No. 570, Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies, with information as to underwriting limitations, areas in which listed sureties are licensed to transact surety business and other details. If the Secretary of the Treasury shall take any exceptions to the annual financial statement submitted by a company, he or she shall, before issuing Department Circular 570, give a company due notice of such exceptions. Copies of the Circular are available at <http://www.fms.treas.gov/c570>, or from the Assistant Commissioner, Management, or incumbent Treasury executive, upon request. Bonds underwritten by certified companies on the Department Circular No. 570 list may be presented to an agency bond-approving official for acceptance. Selection of a particular qualified company from among all companies holding certificates of authority is discretionary with the principal required to furnish the bond, but the acceptance of a bond by an agency bond-approving official is subject to § 223.17.

11. Revise § 223.17 to read as follows:

§ 223.17 Acceptance and non-acceptance of bonds.

(a) *Acceptance of bonds.* A bond underwritten by a certified company on the § 223.16 Department Circular No. 570 list may be presented to an agency-bond approving official for acceptance, and such agency bond-approving official may accept such bonds.

(b) *Non-acceptance of bonds.* (1) An agency bond-approving official has the discretion not to accept bond(s) underwritten by a certified company on

the § 223.16 List of certificate holding companies, Department Circular No. 570, for cause, but only if the certified surety has been given advance written notice by such agency. The advance written notice shall state:

(i) The intention of the agency to decline bond(s) underwritten by the surety;

(ii) The reasons for or cause of the proposed non-acceptance of such bond(s);

(iii) The opportunity for the surety to rebut the stated reasons or cause; and

(iv) The surety's opportunity to cure the stated reasons or cause.

(2) The agency may decline to accept bond(s) underwritten by the surety if, after consideration of any submission by the surety or failure of the surety to respond to the agency notice, the agency issues a written determination that the bond(s) should not be accepted, consistent with agency standards. The agency shall articulate its standards for exercising its discretion not to accept bonds under this paragraph in an agency rule or regulation prior to declining any bonds in specific cases. "For cause" is primarily defined to mean that a surety has not paid or satisfied an administratively final bond obligation due the agency. The articulation of this primary definition is not intended to preclude an agency from articulating additional "for cause" reasons, providing such reasons are defined in an agency rule or regulation in advance, and such additional reasons are otherwise consistent with an agency's own authorities. Existing agency rules or regulations that substantially comply with, or that are consistent with, the requirement to articulate standards in advance meet the requirements of this paragraph.

(3) Agencies that decline bonds under this paragraph are encouraged to use best efforts to ensure that persons conducting business with the agency are aware that bonds underwritten by the particular certified surety will not be accepted.

(4) The authority to decline bonds under this paragraph does not apply when the "for cause" basis, e.g., the obligation of the surety to satisfy administratively final bond obligations, has been stayed or enjoined by a court of competent jurisdiction.

§§ 223.18 through 223.20 [Removed]

12. Remove §§ 223.18, 223.19, and 223.20.

§ 223.17 [Redesignated as § 223.18]

13. Redesignate § 223.17 as § 223.18.

14. Revise newly redesignated

§ 223.18 to read as follows:

§ 223.18 Revocation.

(a) A certified surety's certificate of authority granting the surety the opportunity to present its bonds for approval to an agency bond-approving official, i.e., the surety's listing on Department Circular 570, can be revoked by Treasury in two ways:

(1) Treasury, of its own accord, under § 223.19, may initiate revocation proceedings against the surety when it has reason to believe that a company is not complying with 31 U.S.C. 9304–9308 and/or the regulations under this part, or

(2) Treasury, under § 223.20, may initiate revocation proceedings against the surety upon receipt of a complaint from an agency that the surety has not paid or satisfied an administratively final bond obligation due the agency.

(b) A revocation of a surety's certificate of authority under § 223.19 or § 223.20 precludes the surety from underwriting or reinsuring additional bonds for any agency, and therefore revokes the surety's opportunity to have its bonds presented to any agency bond-approving official for acceptance.

15. Add new § 223.19 to read as follows:

§ 223.19 Treasury initiated revocation proceedings.

Whenever Treasury has reason to believe that a surety is not complying with the requirements of 31 U.S.C. 9304–9308 and/or the regulations in this part, including but not limited to a failure to satisfy corporate and financial standards, Treasury shall:

(a) Notify the company of the facts or conduct which indicate such failure, and provide opportunity to the company to respond, and

(b) Revoke a company's certificate of authority with advice to it if:

(1) The company does not respond satisfactorily to its notification of noncompliance, or

(2) The company, provided an opportunity to demonstrate or achieve compliance, fails to do so.

16. Add new § 223.20 to read as follows:

§ 223.20 Revocation proceedings initiated by Treasury upon receipt of an agency complaint.

(a) *Agency Complaint.* If an agency determines that a surety has not promptly made full payment or fully satisfied an administratively final bond obligation naming the agency as obligee, the head of the agency, or his or her designee, may submit a complaint to the Assistant Commissioner, Management, or incumbent Treasury executive, requesting that the surety's certificate of

authority be revoked for nonperformance of administratively final bond obligations. Under such complaint, the agency shall certify that:

(1) The agency has made a determination, in accordance with applicable agency procedures and standards, that a surety owes on a bond obligation naming the agency as obligee;

(2) The agency has submitted a written demand on behalf of the agency to the surety requesting payment or satisfaction on the bond obligation;

(3) The surety was afforded the opportunity to request administrative review within the agency of the determination that the bond obligation was due, and the agency made a final administrative determination that the bond obligation was due after the completion of such administrative review, *or* the time period for the surety to request administrative review within the agency has expired, *i.e.*, the bond obligation is administratively final;

(4) The agency provided the surety the opportunity to enter into a written agreement to satisfy the obligation;

(5) The surety has not made full payment or fully satisfied the obligation, and the obligation is past due; and

(6) The surety's obligation to make payment or satisfy the obligation has not been stayed or enjoined by a court of competent jurisdiction conducting judicial review of such obligation.

(b) *Documentation of Complaint.* The agency shall include in its complaint a copy of the bond, written notice of the bond claim, pertinent administrative agency decisions supporting the final agency determination that a bond obligation is due, a copy of a written demand letter supporting the determination that payment of the bond obligation is past due, and documentation indicating the surety was afforded the opportunity to enter into a written agreement to satisfy the bond obligation.

(c) *Notice to Surety.* On receipt of a complaint meeting the requirements of paragraphs (a) and (b) of this section, Treasury will notify the surety that its certificate of authority to write additional bonds for any agency will be revoked in the absence of a satisfactory explanation. The notice will require the surety to submit a written explanatory response to Treasury within 20 business days. The notice will advise the surety of the facts and conduct referenced in the complaint. The notice will afford the company the opportunity to demonstrate its qualifications to retain its certificate of authority.

(d) *Reviewing Official and Deciding Official.* The Assistant Commissioner, Management, or incumbent Treasury

executive, will appoint a Reviewing Official to conduct a paper review of the Federal agency complaint referenced in paragraphs (a) and (b) of this section, and the surety response referenced in paragraph (c) of this section, to determine whether revocation of the surety's certificate of authority is warranted. The Reviewing Official is authorized to require the submission of additional documentation from the complaining agency and the surety, to ensure appropriate consideration of relevant factual or legal issues. Upon completion of such review, the Reviewing Official shall prepare a written Recommendation Memorandum addressed to the Assistant Commissioner, Management, or incumbent Treasury executive, setting forth findings and a recommended disposition. The Assistant Commissioner, Management, or incumbent Treasury executive with executive oversight of the Treasury surety program, will be the Deciding Official who will make the final decision whether the surety's certificate of authority to write and reinsure bonds should be revoked based on the administrative record. For these purposes, the administrative record consists of the agency complaint referenced in paragraphs (a) and (b) of this section, the surety response referenced in paragraph (c) of this section, any other documentation submitted to, or considered by, the Reviewing Official, and the Reviewing Official's Recommendation Memorandum.

(e) *Final Decision.* (1) If the Deciding Official's final decision is that revocation is not warranted, the surety and the agency will be notified of the basis of this decision and the complaint against the surety will be dismissed.

(2) If the Deciding Official's final decision is that the surety's certificate of authority shall be revoked, the Deciding Official will notify the surety and the agency of the revocation decision and the basis for such decision. Except as provided in paragraph (g) of this section, the notice will afford the surety an opportunity to demonstrate or achieve compliance, *i.e.*, cure its noncompliance, by satisfying the bond obligations forming the basis of the final decision within 20 business days. If the surety cures its noncompliance within 20 business days, the complaint against the surety will be deemed moot and the surety will retain its certificate of authority to write Federal bonds. If the surety does not cure its noncompliance within 20 business days, the surety's certificate of authority shall be revoked by Treasury without further notice.

(f) *Standard of Review.* (1) In reviewing whether the revocation of the surety's certificate of authority is warranted under this section, the Reviewing Official and the Deciding Official will determine whether the agency's administratively final decision that the surety owes a past-due bond obligation:

(i) Was reasonable;

(ii) Was based on a consideration of relevant factors; and

(iii) Did not involve a clear error of judgment.

(2) The Reviewing Official and the Deciding Official will not conduct a *de novo* review of the agency determination, and will not substitute their judgment for that of the agency.

(g) *Consideration of Willful Conduct.* The surety is not entitled to an opportunity to demonstrate or achieve compliance, *i.e.*, cure its noncompliance, if its conduct in failing to carry out its contracts is willful. For purposes of this regulation, "willful" means a careless or reckless disregard of a known legal obligation to satisfy a past due bond obligation. In considering whether a surety's conduct is willful, the Deciding Official may consider whether:

(1) An agency has filed a prior complaint with Treasury requesting that the surety's certificate be revoked for a substantially similar past-due bond obligation;

(2) The surety asserted substantially similar defenses to such bond obligation;

(3) Such defenses were considered by the agency under pertinent authorities and dismissed;

(4) Treasury made a final decision that revocation of the surety's certificate was justified; and

(5) Other pertinent factors.

(h) *Informal Hearing.* (1) If a surety that is the subject of a paragraphs (a) and (b) of this section complaint believes the opportunity to make known its views, as provided for under § paragraph (c) of this section, is inadequate, it may, within 20 business days of the date of the notice required by paragraph (c), request, in writing, that an informal hearing be convened.

(2) As soon as possible after a written request for an informal hearing is received, the Reviewing Official shall convene an informal hearing, at such time and place as he or she deems appropriate, for the purpose of determining whether the surety's certificate of authority should be revoked.

(3) The surety shall be advised, in writing, of the time and place of the informal hearing and shall be directed

to bring all documents, records and other information as it may find necessary and relevant to support its position.

(4) The surety may be represented by counsel and shall have a fair opportunity to present any relevant material and to examine the administrative record.

(5) The complaining agency may be requested by the Reviewing Official to send a representative to the hearing to present any relevant material, and the agency representative may examine the administrative record.

(6) Formal rules of evidence will not apply at the informal hearing.

(7) The formal adjudication standards under the Administrative Procedures Act, 5 U.S.C. 554, 556, 557 do not apply to the informal hearing or adjudication process.

(8) Treasury may promulgate additional procedural guidance governing the conduct of informal hearings. This additional procedural guidance may be contained in the Annual Letter to Executive Heads of Surety Companies referenced in 31 CFR 223.9, the Treasury Financial Manual, or other Treasury publication or correspondence.

(9) Upon completion of the informal hearing, the Reviewing Official shall prepare a written Recommendation Memorandum addressed to the Assistant Commissioner, Management, or incumbent Treasury executive, setting forth findings and a recommended disposition. The Assistant Commissioner, Management, or incumbent Treasury executive, will be the Deciding Official who will make the final decision whether the surety's certificate of authority to write and reinsure Federal bonds should be revoked based on the administrative record. For these purposes, the administrative record consists of the Federal agency complaint referenced in paragraphs (a) and (b) of this section, the surety response referenced in paragraph (c), any other documentation submitted to, or considered by, or entered into the administrative record by the Reviewing Official, the hearing transcript, and the Reviewing Official's Recommendation Memorandum.

(10) The provisions of paragraphs (e), (f), and (g) of this section shall apply to the adjudication of the agency complaint when an informal hearing is conducted.

17. Revise § 223.21 to read as follows:

§ 223.21 Reinstatement.

If, after one year from the date of the expiration or the revocation of its certificate of authority under this part,

a company can demonstrate that the basis for the non-renewal or revocation has been eliminated or effectively cured, as determined by Treasury in its discretion, and that it can comply with, and does meet, all continuing requirements for certification under 31 U.S.C. 9304–9308 and this part, the company may submit an application to Treasury for reinstatement or reissuance of a certificate of authority, which will be granted without prejudice, *provided* all such requirements are met.

18. In § 223.22, revise paragraph (c) to read as follows:

§ 223.22 Fees for services of the Treasury Department.

* * * * *

(c) Specific fee information may be obtained from the Assistant Commissioner, Management, or incumbent Treasury executive, or online at <http://www.fms.treas.gov/c570>. In addition, a notice of the amount of a fee referred to in paragraphs (a)(1) through (4) of this section will be published in the **Federal Register** as each change in such fee is made.

Dated: March 11, 2011.

Richard L. Gregg,

Fiscal Assistant Secretary.

[FR Doc. 2011–6277 Filed 3–16–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AN28

Dental Conditions

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its adjudication regulations regarding service connection of dental conditions for treatment purposes. The regulations currently state several principles governing determinations by VA's Veterans Benefits Administration (VBA) of service connection of dental conditions for the purpose of establishing eligibility for dental treatment by VA's Veterans Health Administration (VHA). We propose to clarify that those principles apply only when VHA requests information or a rating from VBA for those purposes. The amendments are to clarify existing regulatory provisions and to reflect the respective responsibilities of VHA and VBA in determinations concerning eligibility for dental treatment.

DATES: Comments must be received by VA on or before May 16, 2011.

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll-free number.)

Comments should indicate that they are submitted in response to “RIN 2900–AN28—Dental Conditions.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Tom Kniffen, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–9725. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA's adjudication regulation regarding service connection of dental conditions for treatment purposes, 38 CFR 3.381, identifies circumstances under which dental conditions that may not qualify as disabilities for purposes of VA disability compensation may nevertheless be service connected for purposes of VA dental treatment under 38 U.S.C. 1712 and 38 CFR 17.161. Because VHA has primary responsibility for determining eligibility for dental treatment, VBA will prepare a rating decision under § 3.381 only when VHA requests such a rating or information necessary to assist in its determination. This circumstance is not clearly stated in the current regulation. Accordingly, we propose to amend § 3.381 to state this requirement.

VA's statute and regulation regarding dental conditions, 38 U.S.C. 1712 and 38 CFR 17.161, contain the eligibility requirements for dental treatment. Eligibility for dental treatment is extremely limited. VHA will provide certain dental treatment to veterans:

- Who have a service-connected compensable dental condition (i.e., those subject to service connection for compensation purposes under the 9900 diagnostic code series) (Class I)