

the bare existence of the contract obligation to pay benefits. However, if the particular arrangement were such that monies derived from, or by virtue of, the contract did subsequently flow back to the plan, bonding may be required if such monies returning to the plan are handled by plan administrators, officers or employees. (Further discussion on bonding of insured plans is contained in § 2580.412-6(b)(7)).

**§ 2580.412-6 Determining when “funds or other property” are “handled” so as to require bonding.**

(a) *General scope of term.* (1) A plan administrator, officer, or employee shall be deemed to be “handling” funds or other property of a plan, so as to require bonding under section 13, whenever his duties or activities with respect to given funds or other property are such that there is a risk that such funds or other property could be lost in the event of fraud or dishonesty on the part of such person, acting either alone or in collusion with others. While ordinarily, those plan administrators, officers and employees who “handle” within the meaning of section 13 will be those persons with duties related to the receipt, safekeeping and disbursement of funds, the scope of the term “handles” and the prohibitions of paragraph (b) of section 13 shall be deemed to encompass any relationship of an administrator, officer or employee with respect to funds or other property which can give rise to a risk of loss through fraud or dishonesty. This shall include relationships such as those which involve access to funds or other property or decisionmaking powers with respect to funds or property which can give rise to such risk of loss.

(2) Section 13 contains no exemptions based on the amount or value of funds or other property “handled”, nor is the determination of the existence of risk of loss based on the amount involved. However, regardless of the amount involved, a given duty or relationship to funds or other property shall not be considered “handling”, and bonding is not required, where it occurs under conditions and circumstances in which the risk that a loss will occur through fraud or dishonesty is negligible. This may be the case where the risk of mis-

handling is precluded by the nature of the funds or other property (e.g., checks, securities or title papers which can not be negotiated by the persons performing duties with respect to them). It may also be the case where significant risk of mishandling in the performance of duties of an essentially clerical character is precluded by fiscal controls.

(b) *General criteria for determining “handling”.* Subject to the application of the basic standard of risk of loss to each situation, general criteria for determining whether there is “handling” so as to require bonding are:

(1) *Physical contact.* Physical contact with cash, checks or similar property generally constitutes “handling”. However, persons who from time to time perform counting, packaging, tabulating, messenger or similar duties of an essentially clerical character involving physical contact with funds or other property would not be “handling” when they perform these duties under conditions and circumstances where risk of loss is negligible because of factors such as close supervision and control or the nature of the property.

(2) *Power to exercise physical contact or control.* Whether or not physical contact actually takes place, the power to secure physical possession of cash, checks or similar property through factors such as access to a safe deposit box or similar depository, access to cash or negotiable assets, powers of custody or safekeeping, power to withdraw funds from a bank or other account generally constitutes “handling”, regardless of whether the person in question has specific duties in these matters and regardless of whether the power or access is authorized.

(3) *Power to transfer to oneself or a third party or to negotiate for value.* With respect to property such as mortgages, title to land and buildings, or securities, while physical contact or the possibility of physical contact may not, of itself, give rise to risk of loss so as to constitute “handling”, a person shall be regarded as “handling” such items where he, through actual or apparent authority, can cause those items to be transferred to himself or to a third party or to be negotiated for value.

(4) *Disbursement.* Persons who actually disburse funds or other property, such as officers or trustees authorized to sign checks or other negotiable instruments, or persons who make cash disbursements, shall be considered to be “handling” such funds or property. Whether other persons who may influence, authorize or direct disbursements or the signing or endorsing of checks or similar instruments will be considered to be “handling” funds or other property shall be determined by reference to the particular duties or responsibilities of such persons as applied to the basic criteria of risk of loss.

(5) *Signing or endorsing checks or other negotiable instruments.* In connection with disbursements or otherwise, any persons with the power to sign or endorse checks or similar instruments or otherwise render them transferable, whether individually or as co-signers with one or more persons, shall each be considered to be “handling” such funds or other property.

(6) *Supervisory or decision making responsibility.* To the extent a person’s supervisory or decision making responsibility involves factors in relationship to funds discussed in paragraph (b)(1), (2), (3), (4), or (5) of this section, such persons shall be considered to be “handling” in the same manner as any person to whom the criteria of those paragraphs apply. To the extent that only general responsibility for the conduct of the business affairs of the plan is involved, including such functions as approval of contracts, authorization of disbursements, auditing of accounts, investment decisions, determination of benefit claims and similar responsibilities, such persons shall be considered to be “handling” whenever the facts of the particular case raise the possibility that funds or other property of the plan are likely to be lost in the event of their fraud or dishonesty. The mere fact of general supervision would not necessarily, in and of itself, mean that such persons are “handling.” Factors to be accorded weight are the system of fiscal controls, the closeness and continuity of supervision, who is in fact charged with, or actually exercising final responsibility for determining whether specific disbursements, investments, contracts, or benefit claims are

bona fide, regular and made in accordance with the applicable trust instrument or other plan documents.

(i) For example, persons having supervisory or decisionmaking responsibility would be “handling” to the extent they:

(a) Act in the capacity of plan “administrator” and have ultimate responsibility for the plan within the meaning of the definition of “administrator” (except to the extent that it can be shown that such persons could not, in fact, cause a loss to the plan to occur through fraud or dishonesty);

(b) Exercise close supervision over corporate trustees or other parties charged with dealing with plan funds or other property; exercise such close control over investment policy that they, in effect, determine all specific investments;

(c) Conduct, in effect, a continuing daily audit of the persons who “handle” funds;

(d) Regularly review and have veto power over the actions of a disbursing officer whose duties are essentially ministerial.

(ii) On the other hand, persons having supervisory or decisionmaking responsibility would not be “handling” to the extent:

(a) They merely conduct a periodic or sporadic audit of the persons who “handle” funds;

(b) Their duties with respect to investment policy are essentially advisory;

(c) They make a broad general allocation of funds or general authorization of disbursements intended to permit expenditures by a disbursing officer who has final responsibility for determining the propriety of any specific expenditure and making the actual disbursement;

(d) A bank or corporate trustee has all the day to day functions of administering the plan;

(e) They are in the nature of a Board of Directors of a corporation or similar authority acting for the corporation rather than for the plan and do not perform specific functions with respect to the operations of the plan.

(7) *Insured plan arrangements.* In many cases, plan contributions made

by employers or employee organizations or by withholding from employee's salaries are not segregated from the general assets of the employer or employee organization until payment for purchase of benefits from an insurance carrier or service or other organization. No bonding is required with respect to the payment of premiums or other payments made to purchase such benefits directly from general assets, nor with respect to the bare existence of the contract obligation to pay benefits. Such arrangements would not normally be subject to bonding except to the extent that monies returned by way of benefit payments, cash surrender, dividends, credits or otherwise, and which by the terms of the plan belonged to the plan (rather than to the employer, employee organization, insurance carrier or service or other organization) were subject to "handling" by plan administrators, officers or employees.

#### **Subpart B—Scope and Form of the Bond**

##### **§ 2580.412-7 Statutory provision—scope of the bond.**

The statute requires that the bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of a plan administrator, officer, or employee, directly or through connivance with others.

##### **§ 2580.412-8 The nature of the duties or activities to which the bonding requirement relates.**

The bond required under section 13 is limited to protection for those duties and activities from which loss can arise through fraud or dishonesty. It is not required to provide the same scope of coverage that is required in faithful discharge of duties bonds under the Labor-Management Reporting and Disclosure Act of 1959 or in the faithful performance bonds of public officials.

##### **§ 2580.412-9 Meaning of fraud or dishonesty.**

The term "fraud or dishonesty" shall be deemed to encompass all those risks of loss that might arise through dishonest or fraudulent acts in handling

of funds as delineated in § 2580.412-6. As such, the bond must provide recovery for loss occasioned by such acts even though no personal gain accrues to the person committing the act and the act is not subject to punishment as a crime or misdemeanor, provided that within the law of the state in which the act is committed, a court would afford recovery under a bond providing protection against fraud or dishonesty. As usually applied under state laws, the term "fraud or dishonesty" encompasses such matters as larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication or any other fraudulent or dishonest acts. For the purposes of section 13, other fraudulent or dishonest acts shall also be deemed to include acts where losses result through any act or arrangement prohibited by title 18, section 1954 of the U.S. Code.

##### **§ 2580.412-10 Individual or schedule or blanket form of bonds.**

Section 13 provides that "any bond shall be in a form or of a type approved by the Secretary, including individual bonds or schedule or blanket forms of bonds which cover a group or class". Any form of bond which may be described as individual, schedule or blanket in form or any combination of such forms of bonds shall be acceptable to meet the requirements of section 13, provided that in each case, the form of the bond, in its particular clauses and application, is not inconsistent with meeting the substantive requirements of the statute for the persons and plan involved and with meeting the specific requirements of the regulations in this part. Basic types of bonds in general usage are:

(a) *Individual bond.* Covers a named individual in a stated penalty.

(b) *Name schedule bond.* Covers a number of named individuals in the respective amounts set opposite their names.

(c) *Position schedule bond.* Covers each of the occupants of positions listed in the schedule in the respective amounts set opposite such positions.

(d) *Blanket bonds.* Cover all the insured's officers and employees with no schedule or list of those covered being necessary and with all new officers and