FINANCIAL ASSURANCE: MONITORING FINANCIAL HEALTH

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FINANCIAL ASSURANCE IN THE CURRENT ECONOMIC CLIMATE

- EPA and states need to be able to respond if:
  - Issuing institutions no longer have the ability to issue FA instruments;
  - Companies using the FT/CG no longer qualify to do so or fail to meet the test due to a change in their financial situation; or
  - Issuing institutions, trustees, or facilities enter into bankruptcy.

- Without financial assurance, it may be difficult to properly close, conduct post-closure care, and to clean-up facilities and sites.
INCAPACITY OF ISSUING INSTITUTIONS

- Facilities using trust funds, surety bonds, letters of credit, or insurance policies must establish alternate financial assurance within 60 days in the event of:
  - Bankruptcy of the trustee or issuing institution.
  - Revocation of the authority of the trustee institution to act as trustee.
  - Revocation of the authority of the institution issuing the surety bond (e.g., no longer listed on the Circular 570).
  - Revocation of the authority of the issuing institution to issue letters of credit.
  - Revocation of the authority of the insurer to issue insurance policies (e.g., the insurer is no longer licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus line insurer).

- 40 C.F.R. § 264.148
INABILITY TO MEET FINANCIAL TEST/ CORPORATE GUARANTEE

- If the owner/operator or the guarantor no longer meets the requirements of the financial test, he must send notice to the regulator within 90 days after the end of the fiscal year.
  - The facility or guarantor has 120 days after the end of the fiscal year to obtain an alternate instrument.
- Following the submission of the financial test or corporate guarantee, the regulator may determine that the owner/operator or the guarantor no longer meets the requirements of the financial test:
  - Facility or guarantor has 30 days to obtain an alternate instrument after notification of such a finding.
BANKRUPTCY

- Companies are required to have compliant RCRA financial assurance while in bankruptcy.
- Facilities must notify EPA within 10 days by certified mail of the commencement of a voluntary or involuntary bankruptcy proceeding. 40 C.F.R. § 264.148
- Enforcement actions for financial assurance may proceed in bankruptcy.
- Penalties may be assessed for failure to have financial assurance while company is in bankruptcy.
- American Bankruptcy Institute (ABI) (www.abiworld.org)
- Bankruptcy Data - provides access to information on thousands of business bankruptcy filings from Federal bankruptcy districts and provides a free headline new service (www.bankruptcydata.com)
SWITCHING TO AN ALTERNATE MECHANISM

- Carefully review the alternative financial assurance instrument to determine that the instrument meets all regulatory requirements.
- Verify the identity and authorization of the issuing institution.
- Verify that the cost estimates are accurate and current (e.g., adjusted for inflation).
TRACKING FINANCIAL ASSURANCE

- Important to have a tracking system to monitor what financial assurance instruments facilities are using and who are the instrument providers.
- Need to have the ability conduct real-time analysis.
- States and EPA need to be able to swiftly respond when:
  - Facilities using the FT/CG are having financial difficulties or have entered into bankruptcy.
  - Issuing institutions or trustees of third party financial assurance mechanisms no longer have the authority to issue the mechanisms or have entered into bankruptcy.
EXAMPLE OF TRACKING ISSUING INSTITUTIONS: LIQUIDITY PROBLEMS & GOVERNMENT INTERVENTION

- **AIG in 2008:**
  - Nation’s largest insurance group
  - 48 facilities had over $225 million in surety bonds and insurance coverage
  - Monitored what assets AIG was selling and what was its credit rating

- **Wachovia in 2008:**
  - Nation’s fourth largest bank
  - 35 facilities had LOCs with Wachovia
  - One TSD had a $69 million LOC with Wachovia
  - Monitored who was purchasing Wachovia - purchased by Wells Fargo in 2008 (Citigroup first looked poised to buy Wachovia)
In 2009, EPA sent information requests to 22 RCRA TSDs using the FT/CG that had bonds that were rated junk or had a rating on the cusp of junk.
- 3 no longer met the requirements of the financial test;
- 5 failed to meet the financial test requirements; and
- 7 had switched or planned to switch to third party mechanisms.

EPA was able to target these companies based on the financial record reviews undertaken during the national priority along with contractor assistance crosschecking facilities using the FT/CG and those with bonds that were rated junk or had a rating on the cusp of junk.
IDENTIFYING COMPANIES AT RISK

- Recipients of Troubled Asset Relief Program (TARP) Funding
- Moody’s Bottom Run List tracks the ‘riskiest’ 15 percent of companies that Moody’s follows and is published quarterly
  - [www.moodys.com/BottomRung](http://www.moodys.com/BottomRung)
Monitor Companies’ Financial Health

- Monitor both the company that owns/operates the facility or is the issuing institution, as well as the parent company.
  - Look at corporate structure (e.g., Dun & Bradstreet Who Owns Whom, Moody’s Family Tree)

- Monitor the Business Press

- Monitor ratings by a Nationally Recognized Statistical Ratings Organization
  - E.g., Moody’s, Standard & Poor’s, Fitch, A.M. Best
MONITOR COMPANIES’ FINANCIAL HEALTH: PUBLICLY TRADED COMPANIES

 Publicly traded companies are required to file audited financial statements with the SEC
   Form 10-K. Annual financial report
   Form 10-Q. Quarterly financial report.
   Search by company name at: http://www.sec.gov/edgar.shtml

 Value Line - gathers financial information on publically traded companies
   http://www.valueline.com
MONITOR ISSUING INSTITUTIONS: BANKING & FINANCIAL INSTITUTIONS

- Nationally Charted Credit Unions - www.ncua.gov
- American Bankers Association - www.aba.com
- Conference of State Bank Supervisors (CSBS) - www.csbs.org
**Monitor Issuing Institutions:**

**Surety Companies**

- Subscribe to Circular 570 e-mail updates - http://fmsapps.treas.gov/subscription/subscription.asp
- Be on the lookout for cancellation notices from the surety company.
  - Sureties may not cancel the surety bond until 120 days after receipt of the cancellation notice by both the regulator and the facility.
  - Facilities are required to provide alternate financial assurance within 90 days after the receipt of a cancellation notice.
Monitor Issuing Institutions: Providers of Letter of Credit

- Be on the lookout for notices from the issuing institution not to extend the letter of credit beyond the current expiration date.
- The letter of credit will not expire until 120 days after receipt of the non-extension notice by both the regulator and the facility.
- Facilities are required to provide alternate financial assurance within 90 days after the receipt of such notice.
- Be prepared to draw on the letter of credit and deposit the funds in the standby trust fund if the facility does not provide alternate financial assurance within 90 days.
Financial Responsibility Enforcement Tool

- Interactive training tool and data repository for federal and state regulators.
- Includes EPA guidance, memoranda, regulatory materials, and other resources
- Includes decision trees designed to walk regulators step-by-step in evaluating financial assurance submissions.
- Contact Chrisna Tan (tan.chrisna@epa.gov) for a username and password.
- EPA webinar on how to use the tool July 20, 2011 (federal and state regulators only)