RCRA Subtitle C Financial Assurance Instrument Fact Sheet
INSURANCE

Regulatory Resources:
- Code of Federal Regulations, Title 40, Volume 22, Chapter 1, Part 264
- Code of Federal Regulations, Title 40, Volume 22, Chapter 1, Part 265
- Federal Register

EPA Resources:
- RCRA Financial Assurance Training Module
- RCRA Financial Assurance for TSDFs
- RCRA Online: Financial Assurance

Instrument Summary: An insurance policy is a contract between two parties. One party (the Insurer) agrees to pay, on behalf of the second party (the Policyholder) for claims made against the Policyholder or the policy. For purposes of financial assurance, the owner/operator of a Subtitle C facility ("the Company") is the Policyholder.

Through a policy, the Insurer agrees to reimburse the Company (or another party) upon direction from the Regulator, for costs incurred for closure and post-closure care. In return, the Insurer generally requires that the Company pay cash instalments (or premiums). The Company may also pay a percentage of the policy limit up front in the form of cash collateral. The cash collateral requirement and premium payments often are based on the likelihood of: 1) the loss occurring; and 2) the insurer having to pay claims up to the policy limit. Note, unlike other mechanisms, the Insurer reimburses parties directly at the direction of the Regulator; no standby trust fund is required.

In general, there are two types of insurance policies. The first type, risk transfer policies, assumes the transfer of a future expected loss (or liability) from the Company to the Insurer. Specifically, for closure and post-closure policies, the risk transferred is that the Company will fail to perform closure and/or post-closure as required under the regulations. An example of a reason for why an owner/operator may fail to perform is financial distress. In exchange, the Insurer receives a premium payment from the Company over the life of the policy.

The second type, fully-funded (finite) policies, assumes the transfer of a future expected liability from the Company to the Insurer only for a specific or 'finite' amount. Essentially, the Company pays the Insurer an up-front premium equal to the net present value of the future expected amount of the closure and post-closure costs. Depending on the situation, the insurer may allow the Company to pay in phases.

Risk transfer policies are not generally used for closure and post-closure care. Many insurers underwriting closure and post-closure care do so using only finite (or fully-funded) policies. These policies tend to more closely resemble trust funds than conventional general liability insurance policies, limiting the liability (or risk exposure) of the Insurer.

Regulatory Requirements: The RCRA hazardous waste regulations prescribe the requirements for the use of insurance by a Company demonstrating financial assurance for closure and post-closure at §264.143(e) and §264.145(e), respectively. Key regulatory requirements include:

- The Company must submit to the Regional Administrator a certificate of insurance that conforms to the Federal regulatory wording specified in §264.151(e) or the authorized equivalent state regulatory wording in a state with an authorized program (see §264.143(e)(2) and/or §264.145(e)(2)).
- The insurance policy shall:
    - Stipulate that the Insurer may not cancel, terminate or fail to renew the policy except if the Company fails to pay the premiums (see §264.143(e)(8) and/or §264.145(e)(8)).
    - Stipulate that if the Company fails to pay the premiums and the Insurer wants to cancel, terminate or fail to renew the policy, the Insurer must give the Regulator and the Company 120 days written notice. Cancellation, termination or failure to renew may not occur during the 120 days beginning with the date of receipt of the notice by both the Regulator and the Company (see §264.143(e)(8) and/or §264.145(e)(8)).
    - Stipulate that the cancellation, termination, or failure to renew may not occur and the policy will remain in full force and in effect if, before the date of expiration, the Company declares bankruptcy prior to the expiration date of the policy, or other events occur such as abandonment

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of the facility, termination, revocation, or denial of a permit, or if closure is ordered (see §264.143(e)(8) and/or §264.145(e)(8)).

  - Be automatically renewable (or evergreen) at the face amount of the expiring policy (see §264.143(e)(8) and/or §264.145(e)(8)).
  - Contain a provision that allows the policy to be assigned (or transferred) to the Company's successor (see §264.143(e)(7) and/or §264.145(e)(7)).

- The policy must be held with an insurance carrier licensed to conduct business in one or more states (see §264.143(e)(1) and/or §264.145(e)(1)).
- The policy must have a face value at least equal to the current closure and/or post-closure cost estimates (see §264.143(e)(3) and/or §264.145(e)(3)).
- When current closure and/or post-closure cost estimates increase to an amount greater than the face value of the policy, the Company must submit to the Regional Administrator evidence of either an increase in the value of the policy or provide for other financial assurance coverage using one or more of the financial assurance mechanisms allowed (see §264.143(e)(9) and/or §264.145(e)(9)).
- The Company must maintain accurate and current cost estimates and is required to adjust cost estimates for inflation within 60 days prior to the anniversary of the establishment of the policy (see §264.142(b) and/or §264.144(b)).

Recommended Best Practices: Note: The following best practices are not required under the regulations.

- Ensure that the certificate of insurance has been properly signed and contains the model certificate language in §264.151(e), or state equivalent, and meets all other regulatory requirements.
- Pay particular attention to see if the following language is contained in the certificate: "It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency." (see §264.151(e))
- The regulator may request a copy of the full policy, including endorsements (see §264.151(e)).
- Monitor the Insurer's rating. Many Insurers are rated by commercial ratings agencies, such as Moody's or A.M. Best. Monitoring these ratings over time may provide insight into the Insurer's financial health and prompt discussions with the Company to advise them that if the insurer loses its qualifications, the Company must find a replacement financial assurance mechanism.
- Consider requiring separate sub-limits for each facility. Requiring sub-limits helps to ensure that all the facilities covered by the policy are named, and that one state's access to funds does not undermine another's funds. EPA's regulations which allow a mechanism to be used for multiple facilities require the value of the instrument to be no less than the sum that would be available if separate instruments were established and maintained for each facility. For closure or post-closure of a facility, the Regulator may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism (see §264.143(h)). Without sub-limits, an agreement by an owner or operator and the state may undermine the availability of funds for another state.

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Frequently Asked Questions:

1. **What if the cost estimates change?**
   If the cost estimates increase to an amount greater than the present face value of the policy, the Company shall either: 1) increase the face amount of the policy correspondingly, or 2) obtain alternate financial assurance using one or more of the financial assurance mechanisms allowed to make up the shortfall. If the cost estimates decrease, the face amount of the policy may be reduced to the current cost estimate following written approval from the Regulator (see §264.143(e)(9) and/or §264.145(e)(9)).

2. **What if the Company enters bankruptcy?**
   The policy remains in full force and in effect if the Company files for bankruptcy on or prior to the expiration of the policy (see §264.143(e)(8)(iv) and/or §264.145(e)(8)(iv)). Once the Company emerges from bankruptcy protection, the Insurer may send the notice of cancellation in accordance with§264.143(e)(8) and §264.145(e)(8). As the Company must maintain adequate financial assurance, the regulator should monitor the situation during this period.

3. **What if the Company wants to terminate the insurance policy?**
   The Company can terminate the policy only if: 1) it provides alternate financial assurance using one or more of the mechanisms allowed; or 2) the Regulator releases the Company from the applicable financial requirements (see §§264.143(e)(10)(i)(ii) and/or §§264.145(e)(11)(i)(ii)).

4. **What if the Insurer cancels the insurance policy?**
   An insurer may not cancel, terminate, or fail to renew the policy except for failure by the Company to pay the premium. It is important to note that a failure to pay the premium is the only reason that an Insurer may cancel, terminate, or fail to renew the policy. If there is a failure to pay the premium, the insurer must send notice to the Regional Administrator if the insurer elects to terminate the policy. The policy may not be terminated during the 120 day notice period (see §264.143(e)(8) and/or §264.145(e)(8)).

5. **What if the Regulator is concerned about the financial health of the Insurer?**
   If a Regulator is concerned about the financial health of the Insurer, the Regulator may want to consider monitoring the Insurer's credit ratings from A.M. Best and/or Standard and Poor's as an indicator of the financial health of the Insurer. Where ratings indicate the Insurers' solvency may be in question, the Regulator should discuss the need for alternative financial assurance mechanisms with the Company.

For More Information:

- **State Insurance Commissioners** gather information on Insurers that are licensed to transact business or provide surplus or excess lines insurance in their state. See also the National Association of Insurance Commissioners: State Insurance Department Web Site Listings: http://www.naic.org/state_web_map.htm
- **Insurer Bond Ratings**
  - A.M. Best www.ambest.com
  - Moody's www.moodys.com
  - Standard and Poor's www.standardandpoors.com

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- **National Trade Associations and other Organizations:**
  - American Insurance Association www.aiadc.org
  - Insurance Information Institute www.iii.org
  - National Association of Insurance Commissioners www.naic.org