



# RCRA Subtitle C Financial Assurance Instrument Fact Sheet

## SURETY BOND

**Instrument Summary:** A Surety Bond is a contract between two parties. One party (the Surety) guarantees that the obligations of the second party (the Principal) will be met. For purposes of financial assurance, the owner/operator of a Subtitle C treatment, storage, or disposal facility ("the Company") is the Principal. Through a surety bond, the Surety guarantees to the Regulator that it will meet the Company's closure and/or post-closure obligations, up to the bond limits, if the Company is unable to do so.

The RCRA hazardous waste regulations allow for two types of surety bonds. The first type, performance bonds, is allowed only at permitted facilities. With performance bonds, the surety guarantees that if the Company has failed to meet its obligations under the terms of the bond, it will either: 1) perform the requisite closure/post-closure activity in accordance with the plan on behalf of the Company; or 2) pay out the face value of the bond, in the amount of the current closure or post-closure cost estimate, into a standby trust fund. Performance bonds cannot be combined with other financial assurance mechanisms.

The second type, financial guarantee (or payment) bonds, is allowed at permitted and interim status facilities. With payment bonds, the Surety guarantees that it is liable for the face value of the bond, in the amount of the current closure or post-closure cost estimate, if the Company has failed to perform any of the conditions in the bond, and that the Surety will pay that amount into a standby trust fund when the Regulator informs the Surety that the Company has failed to perform. With either type of surety bond, the Surety retains the right to pursue reimbursement from the Company for funds paid on its behalf.

Similar to a bank with a Letter of Credit, the Surety provides the Company with its financial backing. In return for the Surety's guarantee, the Surety generally receives a premium based on the face value of the bond.

The cost of obtaining a surety bond is a function of its credit worthiness (or financial solvency). The Surety generally places emphasis on prequalification.

**Regulatory Requirements:** The RCRA hazardous waste regulations prescribe the requirements for the use of either a performance bond or a financial guarantee (or payment) bond by a Company demonstrating financial assurance for closure and post-closure at §§264.143(b) and (c) and §§264.145(b) and (c), respectively. Key regulatory requirements include:

- The Company must submit to the Regional Administrator an original signed surety bond which matches the federal regulatory wording specified in §§264.151(b) and (c) for financial guarantee (or payment) bonds and performance bonds, respectively; or the authorized equivalent state regulatory wording in a state with an authorized program (see §§264.143(b)(2) and (c)(2), and/or §§264.145(b)(2) and (c)(2)).
- The Company must establish a standby trust fund and submit an original signed copy of the standby trust agreement, including all schedules and exhibits to the Regional Administrator (see §§264.143(b)(3) and (c)(3), and/or §§264.145(b)(3) and (c)(3)).

### 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](#)

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This fact sheet is based on the RCRA regulations for closure and post closure as detailed in Title 40 of the Code of Federal Regulations (CFR) Parts 264 through 265, with a focus on Part 264, Standards For Owners And Operators Of Hazardous Waste Treatment, Storage, And Disposal Facilities. Generally the Part 264 requirements are mirrored in Part 265, but there are some differences. As appropriate, reference is made to situations where the requirements for interim status facilities (Part 265) differ from the requirements for permitted facilities.



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- The penal sum<sup>1</sup> of the bond must be at least equal to the current closure/post-closure cost estimate. Whenever the closure/post-closure cost estimate increases to an amount greater than the penal sum of the surety bond during the operating life of the facility, the Company must increase the penal sum of the bond to an amount at least equal to the current cost estimate or obtain other financial assurance to cover the increase (see §§264.143(b)(6) and (b)(7) and §§264.143(c)(6) and (c)(7), and/or §§264.145(b)(6) and (b)(7) and §§264.145(c)(6) and (c)(7)).
- The surety company issuing the bond must be listed by the U.S. Treasury in Circular 570 (see §§264.143(b)(1) and (c)(1) and/or §§264.145(b)(1) and (c)(1)).
- The financial institution issuing the standby trust fund must have the authority to act as Trustee and be regulated/examined by an appropriate federal or state agency (see §264.143(a)(1) and/or §264.145(a)(1)).

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

- Place the original, signed document(s) in a safe place (i.e., a fire-proof safe) with no public access.
- Proofread all documents to ensure that the language conforms to the stipulated regulatory wording.
- Ensure that all financial documents reflect the current legal name of both the Company and the Surety.
- Sign up on the Department of Treasury's website to receive notifications of any changes to Circular 570.
- Encourage the Surety to include an optional rider to the bond agreement that automatically increases the face value to reflect current cost estimates. Wording for this rider is included in the model bond language (see §§264.151(b) and (c)).

### Frequently Asked Questions:

#### 1. What if the Surety enters bankruptcy or is removed from Circular 570?

The Company is required to obtain alternate financial assurance using one or more of the financial assurance mechanisms allowed within 60 days after a Surety has filed for bankruptcy or the Surety has been removed from Circular 570 (see §264.148(b)).

#### 2. What if the cost estimates change?

If the cost estimates increase to an amount greater than the present value of the surety bond, the Company must either: 1) increase the value of the bond, or 2) obtain alternate financial assurance using one or more of the financial assurance mechanisms allowed to make up the shortfall. This must be done within 60 days of the change in cost estimates. If the cost estimates decrease, the Regulator may approve an appropriate reduction in the face value of the surety bond (see §§264.143(b)(7) and (c)(7) and/or §§264.145(b)(7) and (c)(7)).

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<sup>1</sup> "Penal sum" is defined as the upward limit of liability on the bond, or the maximum amount of money that the obligee could be compensated if the principal defaults.

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### 3. What if the Surety attempts to cancel the bond?

The Surety is required to notify both the Company and the Regulator by certified mail of its intent to cancel the bond. The Surety cannot cancel the bond within 120 days of notifying the Regulator (see §§264.143(b)(8) and (c)(8) and/or §§264.145(b)(8) and (c)(8)). The Company has 90 days to secure alternate financial assurance and obtain Regulator approval using one or more of the financial assurance mechanisms allowed. If the Company fails to provide alternate financial assurance and receive written approval of the new mechanism by the Regulator within 90 days, the Regulator can direct the Surety to pay up to the amount guaranteed by the bond into the standby trust fund (see §§264.143(b)(4)(ii) and (c)(4)(ii) and/or §§264.145(b)(4)(ii) and (c)(4)(ii)).

### 4. What if the Regulator wants to draw on the bond for closure and/or post-closure care?

For payment bonds, the Regulator sends a written notification to the Surety that the Company has failed to perform in accordance with the requirements of the Bond, and instructs the Surety to place the face value of the bond into the pre-established standby trust fund. The demand letter should explain the condition of the bond that the Company failed to perform. Upon notification that the Company has failed to provide alternate financial assurance and obtain the Regulator's written approval of the alternate financial assurance within 90 days as specified in the RCRA hazardous waste regulations, the Surety must fund the standby trust as directed by the Regulator in the notification (see §§264.143(b) and/or §§264.145(b)).

For performance bonds, the Regulator must send notification to the Surety that the Company has failed to meet its obligations under the terms of the bond. Depending upon the circumstances, this includes notification that the Company has been found in violation of the closure, and or post closure requirements of RCRA, or has failed to provide alternate financial assurance as required by the RCRA hazardous waste regulations. The demand letter should explain the basis for the notification. Upon notification that the Company is in violation of the closure and/or post closure requirements, the Surety must fulfill the obligations of the Company either by: 1) performing closure and/or post-closure in accordance with the approved plans, permit and other applicable requirements; or 2) depositing the face value of the bond into the standby trust fund. Upon notification that the Company has failed to provide alternate financial assurance as specified in the RCRA hazardous waste regulations, the Surety must fund the standby trust as directed by the Regulator in the notification (see §§264.143(c) and/or §§264.145(c)).

Although not required, it is useful to notify the Trustee of the standby trust fund in advance of the expected payments into the Trust by the Surety.

#### For More Information:

- **U.S. Department of the Treasury, Circular 570** is published annually on July 1 in the Federal Register. The Circular lists Companies qualified to write surety bonds, as well as provides information on admitted reinsurers, pools and associations, Lloyd's syndicates and surety underwriting limitations. [www.fms.treas.gov/c570](http://www.fms.treas.gov/c570)
  - An email listserv is available to receive email notification of changes to Circular 570.
- **Code of Federal Regulations**, Title 31, Chapter 2, Volume 2, Parts 223 includes the regulations governing sureties.
- **National Trade Associations and other Organizations**
  - National Association of Surety Bond Producers [www.nasbp.org](http://www.nasbp.org)
  - Surety and Fidelity Association of America [www.surety.org](http://www.surety.org)

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