

Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders

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Office of Enforcement and Compliance Assurance (OECA)
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DISCLAIMER

This document is intended solely as guidance for employees of the U.S. Environmental Protection Agency. It is not a rule and does not create any legal obligations. Whether and how EPA applies this guidance in any given case will depend on the facts of the case.

Table of Contents

Executive Summary

I. Statutory and regulatory background.....	1
A. RCRA closure/post-closure FA requirements as guidelines for CERCLA FA	1
B. CERCLA enforcement documents that contain FA requirements	2
1. Settlement agreements	2
2. Unilateral administrative orders	2
II. Implementation of FA requirements through enforcement documents	2
A. Imposition of FA requirements	2
1. Site-specific considerations	3
2. Regional discretion on the use and type of FA	3
3. FA language.....	4
B. Establishing the FA amount.....	4
1. Potential adjustments to the FA amount	5
2. Considerations for applying a discount rate for FA.....	5
C. Potential FA mechanisms.....	6
1. Considerations relating to the financial test and corporate guarantee	8
2. Considerations relating to insurance policies	9
3. Standby trusts for use in connection with UAOs.....	9
4. Use of multiple FA mechanisms.....	10
5. FA in SAA site agreements	11
D. Timing considerations.....	11
E. Modifications to FA requirements	11
F. Termination of FA requirements	12
G. Compliance monitoring and assessment.....	12
H. Documentation.....	14
I. Potential external influences on FA mechanisms.....	14
1. Inability of third-party FA providers to satisfy FA obligations.....	15
2. Impact of bankruptcy filings on FA.....	15
III. Enforcement of FA provisions	16
A. Types of FA violations	16
B. Repercussions of FA violations	17
C. Obtaining funds or work secured by FA.....	17
1. Multi-PRP situations.....	18
2. FA resources potentially impacted by bankruptcy proceedings	18
D. Penalties for non-compliance with FA provisions.....	19
1. Stipulated penalties.....	19
2. Statutory and civil penalties.....	20
E. Use of CERCLA Section 104(e) to collect additional FA information	20
IV. Conclusion.....	21

LIST OF APPENDICES22

APPENDIX A. Additional FA Resources and Contacts..... A-1

APPENDIX B. Practical Considerations Regarding Financial Test and Corporate
Guarantee FA Options.....B-1

APPENDIX C. Recommended Best Practices for Documentation and Data
Management of Financial Assurance Obtained Pursuant to CERCLA
Settlement Agreements and Unilateral Administrative OrdersC-1

Executive Summary

This document provides guidance to EPA Regions on financial assurance (FA) issues and requirements at sites subject to enforcement actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as “Superfund”).¹ Under the “enforcement first” policy,² EPA seeks to have potentially responsible parties (PRPs) conduct cleanups of hazardous waste sites. PRPs that conduct such cleanups are often subject to FA requirements set forth in settlement agreements and unilateral administrative orders for removal and remedial actions.

Financial assurance requirements in CERCLA enforcement documents protect human health and the environment by ensuring the availability of adequate financial resources to conduct site cleanups. In the event PRPs become unwilling or unable to complete their work obligations, this FA allows EPA or other parties to perform such work without using limited Superfund resources. As discussed below, PRPs can meet these FA requirements in several different ways. Especially given the multi-year timeline of many Superfund cleanups, FA requirements provide an invaluable safeguard against the effect of financial distress that PRPs may experience over that time period. In this way, these FA requirements ensure that PRPs—and not public funding sources—bear the financial burden of completing Superfund cleanups, and thereby both protect limited Superfund resources and accomplish the “polluter pays” principle underpinning of CERCLA.

¹ For additional resources on and contacts to help with FA-related issues, see Appendix A.

² For documents describing EPA’s enforcement first policy, view the documents listed in the Enforcement Processes & Strategies category within the Superfund enforcement policy and guidance documents database, available on the Agency’s website at

http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub_id=104.

I. Statutory and regulatory background

A. RCRA closure/post-closure FA requirements as guidelines for CERCLA FA

EPA requires financial assurance (FA) from potentially responsible parties (PRPs) pursuant to its enforcement authorities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as “Superfund”) (e.g., CERCLA §§ 106 and 122). Separate from the FA requirements included in enforcement documents under these sections, EPA is also developing FA regulations pursuant to CERCLA § 108(b).³

EPA’s Resource Conservation and Recovery Act (RCRA) Subtitle C regulations for closure and post-closure care at hazardous waste treatment, storage, and disposal facilities prescribe FA requirements⁴ that EPA uses as points of comparison for establishing CERCLA FA requirements in enforcement documents. RCRA closure and post-closure FA regulations, however, are not binding in the CERCLA enforcement context. Moreover, FA provisions typically used in the CERCLA enforcement context can differ from those required by such RCRA regulations because of differences in the underlying programs.

The following table summarizes some of the key aspects of FA requirements in the CERCLA enforcement context.

Key Aspects of CERCLA Financial Assurance	
Universe of entities subject to FA obligations for any given site	One or more PRPs could be obligated to comply with FA requirements in connection with a site cleanup
Source of FA requirements	Pursuant to a settlement agreement or unilateral administrative order
Time period that FA requirements are to remain in place	The duration of a cleanup, including any operation and maintenance (O&M) period
Language of FA mechanisms	Should generally follow EPA’s sample language, but could vary on a case-by-case basis

³ This guidance does not address any future CERCLA § 108(b) requirements. For information on the rulemaking process to date, see the Agency’s Superfund Financial Responsibility Web page at <http://www.epa.gov/superfund/policy/financialresponsibility/>.

⁴ See 40 C.F.R. Part 264, Subpart H (regulations relating to closure, post-closure care, and third-party liability for owners and operators of permitted hazardous waste facilities); 40 C.F.R. Part 265, Subpart H (similar regulations relating to owners and operators of facilities operating under interim status); and 40 C.F.R. Part 267, Subpart H (regulations relating to closure and third-party liability for owners and operators of hazardous waste facilities with standardized permits).

B. CERCLA enforcement documents that contain FA requirements

FA requirements are included in settlement agreements and unilateral administrative orders to ensure that PRPs will properly conduct response actions. The basis for FA requirements set forth in both contexts is described below.

1. Settlement agreements

Settlement agreements that provide for performance of response actions, including FA requirements designed to ensure that funds are available to complete such work, are authorized pursuant to CERCLA §§ 106 and 122. Settlements are memorialized either judicially through consent decrees (CDs) or administratively through agreements on consent, commonly known as administrative settlement agreements and orders on consent (ASAOCs). Settlements are the preferred and most cost-effective means for remediating sites. Among the benefits that settlements provide to PRPs are covenants not to sue from the United States⁵ and contribution protection.⁶

2. Unilateral administrative orders

If a settlement cannot be reached, rather than initiating a Superfund-financed response action, EPA may choose to issue a unilateral administrative order (UAO) to compel PRPs to perform specified response actions and should generally include FA requirements within the UAO to ensure that funds are available to complete such work.⁷ UAOs are authorized pursuant to CERCLA § 106(a). In relevant part, CERCLA § 106(a) states that, when the Agency finds that there may be an “imminent and substantial endangerment” to human health or the environment due to conditions at a site, EPA may “take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.” PRPs subject to UAOs receive neither covenants not to sue nor contribution protection, and they are subject to civil penalties under CERCLA § 106(a) and/or treble damages under CERCLA § 107(c)(3) in the event of noncompliance with the terms of the UAO.

II. Implementation of FA requirements through enforcement documents

A. Imposition of FA requirements

As a general matter, FA requirements should be included in settlements and UAOs to ensure that response actions are completed without the need for public funding sources. Response actions can take a variety of forms—removal action, remedial investigation (RI), feasibility study (FS),

⁵ See 42 U.S.C. § 9622(f) (2013) (authorizing EPA to grant covenants not to sue if specified conditions are met).

⁶ See 42 U.S.C. § 9613(f)(2) (2013) (providing that PRPs who enter into settlements are not liable for contribution claims relating to “matters addressed” in such settlements).

⁷ See, e.g., *Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites*, OSRE (June 17, 1999), available at <http://www2.epa.gov/enforcement/guidance-strategies-achieve-timely-settlement-and-implementation-rdra-superfund-sites>.

remedial design (RD), or remedial action (RA)—depending on site conditions and the status of the case on the Superfund timeline.

1. Site-specific considerations

The facts of each case need to be evaluated in determining FA requirements. For example, when deciding whether and how to impose FA requirements, case teams may need to consider the following:

- **Risk factors:** potential risks to human health and the environment if PRPs' required cleanup work at a site were to cease prior to completion.
- **Estimated cost of performing the response action:** the more costly the response action, the more important it is for FA to be in place to protect scarce government resources.
- **Estimated time to complete the response action:** FA may not be as crucial for shorter-term actions (e.g., time-critical removal actions) yet is extremely important for longer-term work requirements (e.g., where construction or O&M is required for a year or more, and especially where the requirements span a very long period of time or are perpetual).
- **Nature and extent of contamination at the site or facility:** FA can be essential at sites with significant quantities of contamination, especially since certain types of contamination are more difficult or complicated to address than others.
- **Details concerning PRPs obligated to perform the response action** (e.g., industry sectors in which PRPs operate and their long-term viability): FA is especially important at sites where the long-term viability of PRPs is in question.

As the factors above indicate, there will usually be a need for Regions to include FA requirements in settlements and UAOs, and especially for the more costly and time-consuming response actions.

2. Regional discretion on the use and type of FA

Despite the general preference for requiring FA from PRPs, Regions have discretion with regard to the specifics of the FA requirements imposed via settlements and UAOs, including whether to include or exclude particular mechanisms as FA options that are available to PRPs.⁸ In doing so, case teams should determine whether Office of Site Remediation Enforcement (OSRE) consultation or prior written approval is necessary relating to the FA requirements at issue.⁹

⁸ To illustrate, Region 10 instituted an FA policy of requiring secure forms of FA at certain mine sites. See *Region 10 Mining Financial Assurance Strategy*, EPA Region 10 (Jan. 16, 2009), available at [http://yosemite.epa.gov/R10/ECOCOMM.NSF/b8b7c39a103a235088256c3e007a4dd9/74d70c3512661df988257402006d039a/\\$FILE/R10%20Mining%20Financial%20Assurance%20Strategy.pdf](http://yosemite.epa.gov/R10/ECOCOMM.NSF/b8b7c39a103a235088256c3e007a4dd9/74d70c3512661df988257402006d039a/$FILE/R10%20Mining%20Financial%20Assurance%20Strategy.pdf).

⁹ For information regarding Headquarters' review requirements, see the *OECA/OSRE/CERCLA and RCRA/CWA/UST Roles Chart*, March 2013, available at <http://intranet.epa.gov/oeca/osre/documents/roles.html>; see also *OSRE Procedures Handbook for Prior Written and Oral Approvals of CERCLA and RCRA/CWA/UST Settlements*, Sept. 30, 2010, available at <http://intranet.epa.gov/oeca/osre/documents/pwa.html>.

Specifically, on FA matters, the *OECA/OSRE CERCLA and RCRA/CWA/UST Roles Chart* (“Roles Chart”) requires:

- (a) OSRE prior written approval of:
 - (i) all RD/RA CDs that do not include FA (except for those that involve records of decision (RODs) calling for only institutional controls (ICs) or monitored natural attenuation); and
 - (ii) RA CDs regarding Superfund Alternative approach (*see* Section II.C.5 below) sites that omit or substantively modify liquid FA requirements; and
- (b) Consultation with OSRE on FA provisions in UAOs.

Headquarters encourages the Regions to continue to use OSRE’s FA team as a resource and to informally consult with the team on significant and novel FA issues as they arise.

3. FA language

When drafting FA requirements for inclusion in settlements or UAOs, case teams should use existing model/sample FA language, unless site-specific considerations dictate otherwise.¹⁰ At a minimum, Regions should make sure that FA provisions in enforcement documents are consistent with the terms of related FA mechanisms (e.g., by ensuring consistency among provisions relating to when and how EPA can access FA funds). Moreover, as described in greater detail in Section II.C.3 below, if PRPs subject to UAO FA requirements seek to establish FA by using particular FA mechanisms, then case teams should require such PRPs to also establish an unfunded “standby” trust fund¹¹ pursuant to the UAO.¹²

B. Establishing the FA amount

After the case team determines that FA should be required for a settlement or UAO, a key issue is determining the amount of FA to be provided. EPA’s standard approach is to require an FA amount that is at least equal to the most recent cost estimate for the applicable work at issue and is not offset by FA required pursuant to other authorities.¹³ Thus, EPA typically requires an initial FA amount that, subject to necessary adjustments, mirrors the cost estimate for work to be completed (investigatory, design, removal, remedial, long-term management and treatment, etc.)

¹⁰ *See, e.g., Model Remedial Design/Remedial Action Consent Decree*, § IX, EPA and DOJ (Sept. 2014) (hereinafter, the “Model RD/RA CD”), available in the RD/RA category of the Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>; *see also* EPA’s sample FA mechanisms, available in the Financial Assurance categories of the same database.

¹¹ Standby trusts differ from stand-alone trusts described in Section III.C below in that they are unfunded (i.e., in standby) until another FA mechanisms pays into them.

¹² Model UAO FA language and a sample UAO FA standby trust fund are included with this package. As noted in Section II.A.2 above, consultation with OSRE is required on FA provisions in UAOs. Regions are also encouraged to contact a member of OSRE’s FA team (for contact information, see Appendix A) for assistance on UAO-related FA matters.

¹³ Before offsetting the amount of FA required under a settlement or UAO by FA required pursuant to other authorities, case teams should exercise care and are encouraged to contact a member of OSRE’s FA team (for contact information, see Appendix A) for assistance.

as set forth in the applicable decision document (e.g., a ROD for remedial work or an engineering evaluation/cost analysis or action memorandum for removal actions). Among other things, the required FA amount should capture EPA's indirect costs¹⁴ and the costs of long-term measures, such as O&M.

1. Potential adjustments to the FA amount

Cost estimates are more accurate as a cleanup progresses along the Superfund pipeline (from investigatory work into planning, design, implementation, and post-remedy measures), so the FA amount should reflect cost estimate modifications and site-specific developments. Therefore, EPA should require increases in the FA amount when appropriate (e.g., to account for unexpected costs or analysis periods that differ from the relevant decision document's assumptions).

Knowing that cleanup cost estimates and required FA amounts may change over time, FA provisions in settlements and UAOs should include a process for implementing adjustments to required FA amounts.¹⁵ For example, PRPs should be able to request reductions in the FA amount at certain intervals, but should not be able to implement such reductions without EPA's written approval.

2. Considerations for applying a discount rate for FA

A discount rate is the interest rate used in calculating the present value of expected future costs.¹⁶ As noted in existing EPA guidance for documenting cost estimates during the FS, the Agency generally uses a 7% real discount rate to compare alternatives during the remedy selection process.¹⁷ The goal of that guidance was to improve consistency, completeness, and accuracy of cost estimates developed specifically during the feasibility study phase of the Superfund remedy selection process, but not to offer guidance on determining an FA amount.

FA requirements are generally designed to ensure that sufficient funds are available for the government or another party to complete cleanup work if a PRP does not perform the required work. The Agency believes that FA based on a 7% discount rate could be insufficient to perform

¹⁴ For information on Superfund indirect cost rates, see the memorandum available at http://www.epa.gov/superfund/policy/pdfs/indirect_rate.pdf.

¹⁵ See, e.g., Model RD/RA CD, *supra* note 11, at ¶ 32.

¹⁶ If a discount rate is applied to a cost estimate to establish an FA amount, it would take into account the time value of money—the general idea that a dollar today is worth more than a dollar tomorrow—by assuming that the initial FA amount would appreciate over time at a projected growth rate. The higher the discount rate that is applied, the less FA would initially be required, and the more it would need to appreciate to meet the anticipated funding needs at the site.

¹⁷ See EPA Office of Solid Waste and Emergency Response, *OSWER 9355.0-75, A Guide to Developing and Documenting Cost Estimates During the Feasibility Study* (July 2000), p. 4-4, available at <http://www.epa.gov/superfund/policy/remedy/pdfs/finaldoc.pdf> (stating that the “specified rate of 7% represents a ‘real’ discount rate in that it approximates the marginal pretax rate of return on an average investment in the private sector in recent years and has been adjusted to eliminate the effect of expected inflation”).

the work because funds called in from FA mechanisms are typically deposited into “special accounts”¹⁸ or standby trusts, which are unlikely to grow at this annualized real rate.

EPA recommends that, when using discount rates to derive FA estimates, case teams consider using publicly-available return rates on whichever vehicle ultimately stands to receive any FA funds while factoring in both the estimated time to complete the cleanup work¹⁹ and any potential reductions in the vehicle over time (e.g., taxes and fees on trusts, and rate of inflation). For instance, if a special account is expected to receive funds from an FA mechanism, case teams could apply a discount rate derived from the Superfund’s rates of return.²⁰ Likewise, if a trust fund is to receive such funds, expected returns on the trust’s permissible investments could be applied based on the expected cleanup time horizon.²¹

C. Potential FA mechanisms

When FA is needed for a response action, case teams need to decide the types of FA mechanisms that are available to PRPs to satisfy their FA obligations under the settlement or UAO. For instance, in CERCLA settlements, EPA normally accepts one or more of the six FA mechanisms listed and generally described below.²²

- **Trust fund:** an agreement between a PRP (the trust’s “grantor”) and a trustee whereby the trustee holds grantor-provided funds in trust to pay for EPA-approved cleanup expenses;²³
- **Surety (payment or performance) bond:** a contract between a PRP (the bond’s “principal”) and an issuing institution (the bond’s “surety”) whereby the surety guarantees that it will pay for or perform the PRP’s cleanup work obligations up to a specified amount if the PRP fails to perform such work as required;

¹⁸ Special accounts are site-specific, interest-bearing accounts within the Superfund. For documents concerning special accounts, view the Special Accounts category in the Superfund enforcement policy and guidance database, available at

http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub_id=1235.

¹⁹ Establishing FA amounts to cover settlement or UAO obligations over a very long period of time (e.g., hundreds of years) or even perpetually can be complicated, so Regions are encouraged to contact OSRE’s FA team for assistance if such issues arise in a particular case. For a link to OSRE’s FA team members’ contact information, see Appendix A.

²⁰ See EPA’s Office of the Chief Financial Officer’s chronology of interest rates from 1980 to the present, available at http://www.epa.gov/ocfo/finstatement/superfund/int_rate.htm (noting 0.81% rate for fiscal year 2014).

²¹ See, e.g., OMB Circular A-94 Appendix C (Revised Dec. 2013), available at http://www.whitehouse.gov/omb/circulars_a094/a94_appx-c (forecasting real interest rates for six periods, including a 1.1% real rate for 30-year Treasuries that can be applied for 30-year or 30-plus year cleanups).

²² For a link to sample FA mechanisms, see *supra* note 11.

²³ As stated in Section II.A.3 above and as described in Section II.C.3 below, EPA may require the establishment of a standby trust fund in combination with certain other FA mechanisms (e.g., surety bonds, letters of credit, and corporate guarantees) to receive funds called in from such other FA mechanisms if the applicable FA provider is directed to do so pursuant to the applicable enforcement document.

- **Letter of credit:** a document issued by an institution that guarantees the payment of a PRP’s (the letter of credit “applicant”) cleanup work obligations up to a specified amount if the PRP fails to perform such work as required;
- **Insurance policy:** a contract between a PRP (the “insured” policyholder) and an insurance company (the “insurer”) whereby the insurer agrees to pay for claims made against the PRP or policy in connection with site-related issues;
- **Financial test:** specified criteria and reporting requirements that a PRP must satisfy to demonstrate its ability to pay for its cleanup work obligations; and
- **Corporate guarantee:** a guarantee by an affiliated entity (the “guarantor”) of a PRP, predicated on the guarantor’s ability to satisfy specified financial test criteria and reporting requirements, to pay for or perform the PRP’s cleanup work obligations if the PRP fails to perform such work as required.

Other FA mechanisms (e.g., escrow accounts, certificates of deposit, and commitments to secure FA upon asset sales) may also be acceptable in the CERCLA enforcement context based on site-specific considerations.²⁴

FA is required to ensure that funds are available to complete cleanups, so case teams should understand that EPA’s ability to access FA funds (in the case of a settlement agreement) or direct FA funds into a standby trust (in the case of a UAO) could differ from a timing standpoint between the mechanisms. The following table is designed to highlight the relative extent to which the FA mechanisms listed above are readily convertible into cash to fund cleanups.

Convertibility into Cash	FA Mechanism
Readily convertible into cash	Trust funds, payment bonds, and letters of credit
Convertible to cash but may involve procedural delays	Performance bonds and insurance policies
No FA monies are set aside by the PRP or guarantor ²⁵	Financial tests and corporate guarantees

Note that FA monies are not set aside with the financial test and corporate guarantee mechanisms and that EPA’s ability to access funds from insurance policies is subject to the insurance claims process. Thus, when PRPs seek to use these mechanisms to satisfy their FA obligations, case teams should refer to the following two sub-sections for additional information before deciding whether to accept a particular PRP’s proposal.

²⁴ If a PRP proposes to use a nonstandard FA mechanism, Regions are encouraged to contact OSRE’s FA team for assistance. For a link to OSRE’s FA team members’ contact information, see Appendix A.

²⁵ EPA’s sample financial test nevertheless includes a “standby funding commitment” for use in connection with settlements, which is essentially a springing guarantee in that it requires PRPs utilizing the financial test to pay to EPA an amount up to the FA amount if EPA has to take over such PRP’s cleanup work obligations. And EPA’s sample corporate guarantee states that the guarantor must pay for or perform the PRP’s cleanup work obligations if the PRP fails to perform such work as required. For a link to sample FA mechanisms, see *supra* note 11.

1. Considerations relating to the financial test and corporate guarantee

Financial tests and corporate guarantees allow PRPs or their guarantor to essentially “self-insure” the costs of cleanup and other environmental obligations. As such, neither mechanism involves FA monies being set aside by the PRP or guarantor to fund cleanup costs upon a PRP’s failure to satisfy its cleanup work obligations. In this way, the two mechanisms offer a low-cost FA alternative to PRPs and their guarantors who may—on paper—present low risks of failure to EPA. Importantly, however, any submission pursuant to these two FA options should capture all environmental obligations (under CERCLA, RCRA, the Safe Drinking Water Act, etc.) assured through the use of a test or guarantee.

Submissions by PRPs or guarantors in connection with these mechanisms are based on audited financial statements and/or credit ratings, which are reevaluated periodically (ideally, at least once per year) by EPA.²⁶ Moreover, settlements and UAOs typically include provisions requiring such entities to notify EPA if and when they no longer pass the test.

Case teams should bear the following considerations in mind, along with various practical considerations outlined in Appendix B, when financial test and corporate guarantee mechanisms are proposed to be utilized by PRPs for FA purposes at a particular site:

- Both mechanisms rest on the assumption that a company’s (either the PRP itself or a guarantor) recent financial performance is a reasonable predictor of its ability to satisfy environmental obligations covered by the underlying test going forward.
- As a form of self-insurance, the financial test carries with it a higher risk of non-payment than third-party instruments in cases where the relevant PRP’s (or guarantor’s) financial health rapidly declines. For instance, in the event that a PRP files for bankruptcy protection while using the test, the Agency may not be able to ensure that the PRP obtains alternate FA as required under the settlement or UAO.
- The efficacy of the financial test depends on the reliability of the data used to satisfy the financial test requirements (i.e., in calculating the financial ratios underpinning the test and yielding a passable bond rating).

Even so, certain concerns related to the above considerations surrounding the financial test can be counterbalanced by other aspects of the test, including periodic reporting requirements, independent audits, and the use of credit ratings.

In general, before case teams approve the use of a financial test or corporate guarantee as FA at a site, they should appreciate the administrative burdens on the Agency that are associated with the two mechanisms,²⁷ as well as the financial expertise and capabilities that are needed within the

²⁶ For greater protection, case teams may require additional information from PRPs or guarantors, such as more frequent (e.g., quarterly) submissions and notifications upon any bond rating downgrades.

²⁷ Accordingly, case teams may want to caution PRPs that utilizing the financial test or corporate

Region to analyze documentation. For instance, numerous financial submissions (annual letters from entities' financial officers and annual reports from entities' accountants) are involved, which can be difficult and/or time-consuming to fully understand and administer. Analyses of such documentation may exceed a Region's financial expertise and capabilities, in which case the Region should seek Headquarters' assistance.

2. Considerations relating to insurance policies²⁸

If case teams have limited experience in evaluating the effectiveness of an insurance policy as an acceptable FA mechanism, they should exercise caution when insurance policies are offered by PRPs as FA. There is considerable variation among the insurance policy forms employed by different insurance companies, and there are varying impacts of state law on the structure and interpretation of insurance policies. For these reasons, OSRE developed a tip sheet regarding the use of insurance policies as FA but—unlike other FA mechanisms—not a sample insurance policy.²⁹

Based on EPA's limited experience in seeking to collect on insurance policies provided as FA, it may be difficult and/or time-consuming to make successful claims. If so, payments flowing from such insurance policies could be insufficient and/or untimely for FA purposes. And exclusions in policies could limit the coverage provided by the policy to EPA's detriment. Regions reviewing proposed FA insurance policies are encouraged to contact OSRE insurance team members for assistance with these issues.³⁰

3. Standby trusts for use in connection with UAOs

As previewed in Section II.A.3 above, PRPs subject to UAO FA requirements (UAO "Respondents") who provide FA via certain FA mechanisms should also be required to establish an unfunded standby trust fund. Standby trusts should be employed in the UAO context to maintain continuity in the cleanup work process by collecting and disbursing funds called in from certain FA mechanisms. Standby trusts are necessary in conjunction with certain UAO FA mechanisms because, in the absence of a settlement agreement, EPA cannot establish special accounts in accordance with CERCLA § 122(b)(3) to "retain and use" the funds.³¹ As a result, UAO-related FA documents collectively specify that FA funds may not be provided to EPA and should instead be deposited into standby trusts to facilitate required cleanup work under UAOs.³²

guarantee may result in higher oversight billings.

²⁸ Insurance for FA purposes is unrelated to, and an unacceptable replacement for, liability insurance (e.g., commercial general liability insurance and automobile liability insurance) required by settlements and UAOs to cover liabilities arising out of cleanup work performed by or on behalf of PRPs. *See, e.g.*, Model RD/RA CD, *supra* note 11, at ¶ 50.

²⁹ For a link to OSRE's FA tip sheets and sample mechanisms, see Appendix A.

³⁰ For general insurance information and a list of insurance contacts, visit the Insurance team's Web page on the OSRE intranet, available at <http://intranet.epa.gov/oeca/osre>.

³¹ *See generally* 42 U.S.C. § 9622(b)(3) (authorizing EPA to retain and use funds pursuant to settlement agreements); *see also* 31 U.S.C. § 3302(b) (Miscellaneous Receipts Act, requiring EPA to deposit money it receives into the U.S. Treasury's general fund absent statutory authority to retain and use the money).

³² For model UAO FA and Work Takeover language, as well as sample FA mechanisms for use in

Specifically, when EPA issues UAOs to Respondents, and case teams determine that FA requirements are necessary, Respondents should be given a choice among FA mechanism options (e.g., stand-alone trusts,³³ bonds, letters of credit, satisfaction of financial test criteria, and/or corporate guarantees) to satisfy their FA obligations. If Respondents elect to use a bond, letter of credit, or corporate guarantee to satisfy their FA obligations, then they should also be required to establish a standby trust to receive any funds drawn from those mechanisms in the future in accordance with the terms of the UAO. UAOs should provide that, if a Respondent fails to perform required UAO work, then EPA may notify both Respondents and the providers of the affected FA mechanism of the performance failure. EPA's notice should provide Respondents an opportunity to cure the UAO non-compliance within a specified time period. If Respondents fail to cure the non-compliance within the allotted cure period, then EPA should direct the FA providers to deposit funds assured under the UAO into the standby trust. Funds deposited into the standby trust should be used in accordance with the terms of the trust to fulfill Respondents' UAO obligations.³⁴

If a standby trust is funded from an FA mechanism as described in the previous paragraph, then the standby trustee should already be in place to facilitate required cleanup work, subject to EPA's oversight of the work. In particular, the trustee should be authorized by the trust agreement to disburse trust funds to any non-EPA entity (e.g., the trustee's environmental contractors, contractors previously retained by Respondents, or Respondents who resume cleanup work in accordance with the UAO) to pay for UAO past or future costs, subject to any EPA objections solely related to work costs that are inconsistent with the terms and conditions of the UAO. Similarly, the trustee should be authorized to disburse excess monies not needed for cleanups. In this way, the standby trust achieves EPA's goal of ensuring site cleanups—facilitated either by trustees or Respondents.

4. Use of multiple FA mechanisms

Multiple FA mechanisms can be used to satisfy the FA requirements relating to a particular site. So long as the FA provided to EPA—in total—covers the estimated cost of the work, PRPs can decide among themselves how to divide up their respective FA obligations.

EPA typically does not allow the combination of most FA mechanisms that are convertible into cash with financial test, corporate guarantee, or performance bond FA mechanisms at a particular site³⁵ because of, among other things, added burdens on the Agency and possible confusion in monitoring the combination of FA mechanisms that differ in terms of their convertibility into cash. Still, there could be multiple PRPs at a given site and significant variation between the parties' financial health. Accordingly, though it is generally discouraged, based on the facts and

connection with UAOs, see the Financial Assurance categories of the Cleanup Enforcement Model Language and Sample Documents Database, available at <http://cfpub.epa.gov/compliance/models/>.

³³ A stand-alone FA trust, as opposed to a standby trust, is a separate FA mechanism that is established and funded from the outset to finance cleanup work.

³⁴ Another scenario in which standby trusts may be funded is when Respondents fail to secure alternative FA as required by UAOs (e.g., preceding the cancellation of a letter of credit).

³⁵ See Model RD/RA CD, *supra* note 11, at ¶ 27.

circumstances of each case, Regions may allow PRPs to satisfy their FA obligations by using a mix of FA mechanisms along the convertibility-into-cash spectrum (see table in Section II.C above).

5. FA in SAA site agreements

FA requirements set forth in agreements relating to Superfund Alternative Approach (SAA) sites—sites that are eligible to be listed on the National Priorities List (NPL) but are not listed—merit special attention.³⁶ In contrast to NPL sites, SAA sites are not eligible to receive Superfund monies for remedial action, and are thus susceptible to cleanup delays if PRPs at such sites fail or refuse to perform required work.

As a result, SAA settlements for remedial action work should require PRPs to provide at least some portion of the FA—the estimated amount to facilitate work during the NPL listing process—in a form that can be readily converted into cash (see table in Section II.C above), while the balance of the required FA amount may be provided through other available FA mechanisms. This safeguard positions SAA sites in a way that guarantees the continuation of cleanup work during the NPL listing process.

D. Timing considerations

The settlement or UAO should specify the time within which PRPs need to secure FA and send FA-related documentation to EPA. Ideally, FA mechanisms should be negotiated and agreed upon prior to any settlement, in which case the mechanisms should be attached to the settlement.³⁷ Otherwise, PRPs should be given a window of time—usually a specified number of days after the settlement’s “effective date”—to submit finalized FA documents to EPA.

FA requirements pursuant to UAOs are not the product of negotiations, so additional time may be necessary for the PRPs to secure and submit FA, and Regions are encouraged to require the submission of draft FA mechanisms within a specified time period after the UAO’s effective date. Generally, Regions should use their discretion regarding these timing considerations to effectuate the purpose of the FA.

E. Modifications to FA requirements

Recognizing that the type of work (and thus FA) could change over the course of a CERCLA cleanup, and that FA amounts are based on cost estimates that could also change over time, settlements and UAOs usually authorize FA modifications—to amounts, form, and/or terms of the FA—upon EPA’s approval at certain intervals. For instance, PRPs may request a reduction in

³⁶ See generally *Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach*, OSWER 9200.2-125, OSRE and OSRTI (Sept. 28, 2012), available at <http://www2.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>.

³⁷ Case teams lacking expertise on FA matters should solicit input from EPA FA experts, such as a member of OSRE’s FA team, during negotiations and before documents are ready to be executed.

the FA amount based on cleanup work already performed at a site. When evaluating such a request, case teams' focus should be on the estimated costs to complete all required actions at the site rather than on the original cost estimate less any costs incurred by PRPs. PRPs' FA modification requests are usually permitted on a yearly basis, though Regions could consider such requests on a more frequent basis, depending on the particulars of the request and case.

EPA usually has the ability under settlements and UAOs to demand FA modifications as necessary to effectively guarantee the completion of required cleanup work.³⁸ To illustrate, EPA may decide to do so as part of a five-year review³⁹ at a site: during that process, EPA could review the cost estimates for the remaining work at the site in order to verify the reliability of the cost estimate underlying the FA amount.

F. Termination of FA requirements

FA requirements remain in effect unless and until they are released in accordance with the terms of the enforcement document and the relevant FA mechanism. For example, typical FA provisions in settlements and UAOs provide that, if a PRP arranged with a third-party FA provider to satisfy its FA obligations and such FA provider seeks to cancel the mechanism at a later date, then the PRP must secure alternate FA within a specified period before the cancellation date—or else EPA may call in the funds secured by the mechanism.

Any disagreements between EPA and PRPs relating to the release of FA (and certain other circumstances) pursuant to settlements are typically addressed through a “dispute resolution” process. Outside of dispute resolution situations, before releasing PRPs from FA obligations, EPA should make certain that all required work, including long-term response actions such as O&M, has been completed to EPA's satisfaction.

G. Compliance monitoring and assessment

Settlements and UAOs usually provide that PRPs' compliance obligations pursuant to FA requirements are of an ongoing nature. Thus, settlements and UAOs typically require PRPs to monitor the adequacy of their FA commitments over the lifespan of the CERCLA cleanup. If a PRP determines that its FA no longer meets the requirements of the relevant settlement or UAO, then the settlement or UAO typically requires the PRP to notify EPA, within a specified period of time, that it has fallen out of compliance. EPA also has a monitoring role and can notify PRPs of any FA-related non-compliance that comes to the Agency's attention. In either case, the notification of FA non-compliance—by the PRP to EPA or by EPA to the PRP—starts the clock

³⁸ EPA may not, however, on its own initiative or at the request of a PRP, modify the terms of FA in the case of a UAO to provide that EPA—as opposed to the standby trustee—will be taking in or otherwise directly accessing the funds, even if the Region believes such an amendment is necessary to effectively guarantee the completion of the required cleanup work.

³⁹ Five-year reviews, conducted either to meet the CERCLA § 121(c) statutory mandate (i.e., whenever a remedial action results in hazardous substances, pollutants, or contaminants remaining on site) or as a matter of EPA policy, are designed to assist EPA in determining if a remedy is or will be protective of human health and the environment by evaluating the implementation and performance of a remedy. *See generally* <http://www.epa.gov/superfund/fiveyearreview/> (EPA's Five-Year Reviews internet page).

on a cure period, during which time penalties may accrue and the PRP must propose to EPA (and ultimately secure) additional or alternate FA in accordance with the settlement or UAO.

Regions should carefully review initial submissions of FA mechanisms, including the underlying cost estimates, and prudently monitor subsequent FA submissions.⁴⁰ It is also prudent to be aware of PRPs' additional FA obligations, especially relating to financial test and corporate guarantee submissions. The amount and types of FA provided by PRPs across all programs could have an impact on the protectiveness on any given FA mechanism. Proper coordination and tracking of FA mechanisms in each Region will assist in making determinations regarding the soundness of PRPs' proposed FA mechanism. If PRPs seek to change the amount, form, and/or terms of existing FA as referenced in Section II.E above, Regions should evaluate the relevant proposal, approve such requests only if the newly-proposed FA is satisfactory, and release existing FA mechanisms only after alternate FA is established.

Regions are also encouraged to take certain administrative steps to ensure that PRPs satisfy their FA obligations. For example, Regions should:

- Establish and maintain contact with appropriate personnel from third-party FA providers (banks, surety companies, insurers, etc.);
- Ensure that contact information (e.g., name, title, address, and telephone number) for such personnel is included in all FA mechanisms;
- Track required deadlines for submissions of documents associated with the financial test and corporate guarantee mechanisms; and
- Monitor notices from third-party FA providers, especially cancellation or comparable (e.g., non-renewal) notices.⁴¹

⁴⁰ For resources designed to assist in the FA review process, see Appendix A. Regions are also encouraged to contact Region 5 to learn from their recent FA coordination and monitoring efforts. Region 5 developed an electronic tracking program, the *Financial Assurance Compliance Tracking Tool* (FACT Tool) to track FA information submitted under various authorities. For additional information on the FACT Tool, see <http://r5intradev.epa.gov/div/sfd/main/index.php/enforcement/financial-assurance> (Region 5's financial assurance intranet website).

⁴¹ Cancellation-like notices signal that action may be required for the affected PRP to comply with its FA obligations in the future, or that EPA may need to call in the funds guaranteed by the soon-to-be-cancelled mechanism.

Regions should make sure that they have staff dedicated to FA matters for each affected site or facility to monitor the adequacy of FA over time. While certain Regional staff may be extremely experienced with financial matters and FA-related matters in particular, FA monitoring and enforcement objectives are often best accomplished through team efforts.

H. Documentation

Prudent management and safekeeping of FA documentation is critical to ensure that FA provided in connection with settlements and UAOs serves its intended purpose. As described in Appendix C, Regions are encouraged to develop internal procedures detailing how FA mechanisms submitted to EPA should be received, maintained, and monitored.⁴² For instance, Regions should explore instituting logistical controls, including the following:

- Establish a central repository to receive and maintain FA documentation;
- Use a fireproof safe to store FA submissions (or, at a minimum, employ a secure place in which originals of FA mechanisms can be kept);
- Select a dedicated point person, for a particular site or all sites in the Region, to whom FA documentation should be submitted; and
- Maintain a receipt log to record when FA documentation is received by EPA.

It is important to store original FA documents in a safe place with no public access because they may need to be presented—by EPA to the issuing institution—to access the funds guaranteed by the FA mechanisms.

I. Potential external influences on FA mechanisms

Despite best efforts to secure FA to ensure the completion of cleanups, at times EPA must deal with general market conditions beyond the Agency's control that could affect the nature and availability of FA provided in connection with settlements and UAOs.⁴³

Example of case-team collaboration on PRPs' FA obligations:

- A Regional financial analyst initially reviews an FA submission to gauge compliance;
- The analyst works with technical staff (e.g., a remedial project manager or an on-scene coordinator) for up-to-date information on cost estimates; and
- The analyst consults with the case attorney on any legal issues (e.g., potential enforcement actions).

⁴² In addition to developing the FACT Tool referenced above, Region 5 issued standard operating procedures to outline FA roles and responsibilities across all offices in the Region. For a link to Region 5's FA-related practices, see *supra* note 41.

⁴³ Alerts regarding the financial health of FA providers are often discussed on OECA-led monthly FA calls, referenced in Appendix A, with Regions and states.

1. Inability of third-party FA providers to satisfy FA obligations

One example of an external influence on FA requirements is when a third-party provider of an FA mechanism has financial difficulties and is unable to fulfill its contractual obligations related to the PRP-provided FA. In this circumstance, whether or not the FA provider is required to notify EPA about its situation, EPA may need to act to protect the Agency's interests.

As referenced in Section II.G above, PRPs remain responsible for maintaining adequate FA and need to obtain alternative FA within an allotted time period regardless of why their third-party FA providers are unable to satisfy their obligations. For instance, because FA provisions in settlements and UAOs typically require that surety bond providers be listed by the Department of the Treasury as acceptable sureties,⁴⁴ if a surety bond provider is no longer listed as such, then EPA should demand alternative FA from the relevant PRP. Likewise, if a trustee or insurance company can no longer fulfill its obligations under an FA trust fund or insurance policy due to a bankruptcy proceeding or an analogous occurrence (e.g., the loss of a required license or the inability to maintain specified levels of capital), then EPA should require the affected PRP to provide alternative FA.

2. Impact of bankruptcy filings on FA

The filing of a bankruptcy petition by a PRP (a "debtor" in bankruptcy) subject to FA requirements complicates EPA's ability to secure new or additional FA. The degree of difficulty EPA will confront in obtaining new or additional FA after a bankruptcy petition is filed depends on many case-specific factors, such as the nature of the debtors' bankruptcy proceedings (reorganization, liquidation, etc.), the site(s) at issue (operating or closed, debtor-owned or non-owned, etc.), whether the relevant jurisdiction has case law on the interaction between bankruptcy and FA, other parties in interest (U.S. trustees, other environmental regulators, professionals retained by debtors, bankruptcy trustees/examiners, secured/unsecured creditors, etc.), and the debtors' assets (or lack thereof). Therefore, it is difficult to forecast how FA issues will play out in any given bankruptcy.

Still, the following general legal considerations relating to the intersection of FA and bankruptcy matters should be assessed in any bankruptcy case with FA issues:⁴⁵

- A bankruptcy proceeding should have little, if any, effect on debtors' ongoing regulatory compliance obligations or obligations relating to sites they own or operate, including FA requirements, because debtors must "manage and operate the property in [their] possession" in compliance with all valid state and federal laws;⁴⁶

⁴⁴ For a list of acceptable sureties at any given time, see *Department of the Treasury's Listing of Approved Sureties* (Treasury Department Circular 570), available at <http://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm>.

⁴⁵ For additional specifics on the FA/bankruptcy interplay and on EPA's ability to access FA funds during bankruptcies, see Section III.C.2 below.

⁴⁶ See generally 28 U.S.C. § 959(b); *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846 (4th Cir. 2001). However, many debtors and trustees contend that 28 U.S.C. § 959(b) does not apply in liquidating cases where operations have been closed.

- The United States believes that debtors must comply with injunctive (i.e., cleanup work-related) obligations, including any FA requirements, at CERCLA sites pursuant to settlements and UAOs; and
- While the filing of a bankruptcy petition results in the “automatic stay”—a prohibition set forth in Bankruptcy Code Section 362(a) on various creditor actions against debtors, property of the debtors, and the debtors’ estates outside the bankruptcy court—EPA may nevertheless be allowed to commence or continue FA-related enforcement actions seeking injunctive relief, cost recovery, and/or penalties pursuant to a statutory exception to the stay.⁴⁷

EPA must refer matters (e.g., claims against, or injunctive obligations of, PRPs) to the Department of Justice (DOJ) to participate in bankruptcies because they are judicial proceedings. Thus, EPA staff dealing with bankruptcy-related FA issues should contact attorneys with bankruptcy expertise to discuss such issues before taking any enforcement actions.⁴⁸ Taking into account the applicable facts and law in a given jurisdiction, EPA and DOJ should assess the degree of any litigation risk in pursuing FA after a bankruptcy petition is filed and whether a particular case is likely to create a good or bad precedent in the developing law in this area.

EPA and DOJ may decide to file a “protective” claim in a bankruptcy to seek to ensure that a debtor continues to adhere to, among other things, its pre-bankruptcy injunctive obligations, including FA requirements, under settlements and UAOs. If the debtor is subject to FA requirements under a settlement or UAO, then the protective claim should disclose the existence of any FA provided by the debtor and EPA’s rights relating to such FA.

III. Enforcement of FA provisions

A. Types of FA violations

Regions should be aware of, and consider instituting enforcement actions relating to, potential FA violations. For example, some of the more common FA violations involve failures to:

- Obtain adequate FA;
- Submit required FA documentation;
- Satisfy the metrics underlying the financial test and corporate guarantee options; and
- Secure alternative FA when appropriate (e.g., preceding the cancellation of an FA mechanism or once a company no longer passes the financial test).

PRP arguments of good faith efforts to comply with FA requirements, and lack of actual harm to the Agency resulting from an FA violation, are not defenses to FA enforcement actions. FA violations do not excuse the PRPs’ performance of any other requirements set forth in settlements and UAOs.

⁴⁷ See 11 U.S.C. § 362(b)(4) (the “police and regulatory power” exception to the automatic stay).

⁴⁸ For a list of EPA and DOJ bankruptcy practitioners, visit the Bankruptcy Center Workgroup’s Web page on the OSRE intranet, available at <http://intranet.epa.gov/oeca/osre>.

B. Repercussions of FA violations⁴⁹

Case teams should take action, consistent with the process prescribed by the settlement or UAO, if a PRP fails to satisfy its FA obligations. To illustrate, if a PRP fails to comply with its FA obligations or if the adequacy of its FA submissions is unclear, the case team should follow up with the PRP as appropriate and could put the out-of-compliance PRP on a schedule to come into compliance. Similarly, the case team could issue a notice of non-compliance to the PRP, requiring the PRP to comply with its FA obligations within a specified “cure” period. Ultimately, if a PRP is not complying with its FA obligations, the case team could seek what is guaranteed by the relevant FA mechanism (see Section III.C below), seek penalties (see Section III.D below), and/or commence an enforcement action (e.g., injunctive relief to require FA).

C. Obtaining funds or work secured by FA⁵⁰

Funds or work guaranteed by FA mechanisms can be obtained (or funds can be directed into a standby trust in the case of a UAO) under specified circumstances. For instance, under many settlements, EPA can demand funds or work⁵¹ secured by an FA mechanism if:

- The applicable PRP fails to perform all or any portion of the required response action and EPA takes over such work—a “work takeover” situation; or
- EPA receives notice of an impending FA mechanism cancellation or non-extension, and the affected PRP fails to establish alternative FA within the allotted time.

In the former scenario, EPA can draw on any of the guaranteed funds after a work takeover notice is issued to, and not timely cured by, the applicable PRP. In the latter scenario, EPA can draw on any of the guaranteed funds for a set period of time (i.e., EPA must usually act by a certain date or else the mechanism could lapse).

Though settlements and UAOs fully preserve EPA’s ability to use Superfund monies to perform response actions at NPL sites in work takeover situations, once EPA decides that FA funds or guarantees are needed to facilitate such work, EPA should follow the procedures set forth in the applicable enforcement document and FA mechanism to seek funds guaranteed by an FA mechanism. For instance, if a PRP is out of compliance and EPA therefore elects to draw on a payment bond secured by the PRP to satisfy its FA obligations, the Agency would typically send a written notification to both the PRP (informing the PRP of its non-compliance and EPA’s intent to access the bond) and the surety company (explaining the nature of the PRP’s non-compliance and how such non-compliance gives rise to EPA’s right to demand funds guaranteed

⁴⁹ For assistance with drafting, or to see examples of, letters to PRPs regarding FA non-compliance matters (e.g., letters to call in FA funds, delinquency letters, and notices of violations), Regions are encouraged to contact OSRE’s FA team (for contact information, see Appendix A).

⁵⁰ If questions arise regarding whether or how to access FA mechanisms in a particular case, Regions are encouraged to contact OSRE’s FA team for assistance (for contact information, see Appendix A).

⁵¹ Certain FA mechanisms (e.g., performance bonds and corporate guarantees) typically allow the FA provider to pay for or perform required work if the applicable PRP fails to do so. As such, while this Section III.C highlights payment-related scenarios, case teams should understand that such FA providers could avail themselves of the option to perform work in the PRP’s stead.

by the bond); concurrently, EPA would direct the surety company to deposit, within the time period specified in the bond obtained by the PRP, the guaranteed FA funds into a special account or standby trust fund as appropriate.

1. Multi-PRP situations

Even with the joint and several liability underpinnings of CERCLA, PRPs obligated to finance and perform cleanup work pursuant to settlements and UAOs are not necessarily similarly situated from a financial standpoint. Accordingly, FA matters can get complicated with multi-PRP-led cleanups, especially where PRPs provide separate mechanisms to satisfy their FA obligations in a piecemeal way as opposed to a jointly-funded (e.g., trust) mechanism to collectively cover the PRPs' FA obligations.⁵²

Case teams should decide how to proceed in such instances by keeping in mind the overall cleanup. To illustrate, if a PRP under a multi-PRP settlement that had separately secured FA initiates a bankruptcy proceeding or is recalcitrant (i.e., ceases to perform required cleanup work, is seriously or repeatedly deficient or late in performing such work, or is performing such work in a manner that may cause an endangerment to human health or the environment), then the case team, irrespective of the case team's enforcement actions against the bankrupt or recalcitrant PRP, may elect to invoke the joint and several liability provision of the settlement⁵³ and request that the remaining PRPs perform the bankrupt or recalcitrant party's work.

2. FA resources potentially impacted by bankruptcy proceedings

While EPA should always be aware of FA-related cut-off dates, case teams should be especially attentive to deadlines related to FA mechanisms provided by PRPs in bankruptcy given all of the other tight time pressures the Agency faces in bankruptcy cases. Before seeking to access FA resources that could be implicated by a bankruptcy proceeding, case teams should exercise care and contact DOJ's bankruptcy attorneys.

The threshold question that must be analyzed in bankruptcy scenarios is whether EPA's actions may affect "property of the [debtor's] estate"⁵⁴ because attempts to obtain such property may be subject to the automatic stay if the police and regulatory power exception referenced in Section II.I.2 above does not apply. FA that exists at the time of the filing of a bankruptcy petition may not be property of the debtor's estate. In some circumstances, FA may be found to be property of the estate yet the debtor's interest in it may be limited to a narrow technical legal

⁵² If PRPs subject to FA requirements under a settlement or UAO plan to use multiple mechanisms to satisfy their FA obligations, then the case team may want to explain to the PRPs that such an approach would likely lead to higher oversight billings because of the need for EPA to review the assorted mechanisms.

⁵³ See, e.g., Model RD/RA CD, *supra* note 11, at ¶ 6.b.

⁵⁴ The Bankruptcy Code provides that the filing of a bankruptcy petition creates an estate that is comprised of the debtor's "legal or equitable interests" in property. See 11 U.S.C. § 541(a)(1). Property of the estate is administered by the debtor (in reorganizations) or trustee (in liquidations) and used for distributions pursuant to bankruptcy plans.

interest or theoretical reversionary interest. EPA may have a predominant equitable interest in the FA, which may be considered a secured interest.

If an FA mechanism is not property of the estate, then EPA should be able to obtain any resources guaranteed by such mechanism during the bankruptcy without court approval; if not, EPA would need bankruptcy court approval to do so. For example, if a PRP secured a letter of credit as FA pursuant to a settlement before filing for bankruptcy, EPA should be able to draw on the letter of credit because it and its proceeds are generally considered assets outside of bankruptcy estates.⁵⁵ Still, EPA should consult with DOJ to determine whether there are any arguments that the debtor might make that could affect EPA's rights. Other FA mechanisms, such as trust funds, may in some circumstances be considered property of the debtors' bankruptcy estates to the extent of debtors' interest in the FA. This would mean that EPA may have to obtain bankruptcy court approval before collecting funds pursuant to the FA mechanism. EPA faces additional litigation risks when an entity using the financial test or providing a guarantee files for bankruptcy protection.

Each bankruptcy case, like each site cleanup, is different. Therefore, the resolution of the debtors' FA obligations in the bankruptcy context will depend on the facts and circumstances of the case referenced in Section II.I.2 above.

D. Penalties for non-compliance with FA provisions

For deterrence purposes, stipulated and/or civil penalties may be available in connection with FA violations of settlements and/or UAOs. Such penalties may typically accrue regardless of whether EPA has notified the applicable PRP of a violation.

1. Stipulated penalties

CERCLA settlements typically authorize EPA to seek "stipulated penalties" in the event of any future violations of the conditions of the settlements.⁵⁶ Generally speaking, stipulated penalties are fixed amounts that PRPs agree to pay in the event that they fail to comply with a settlement provision in the future, unless the failure to comply is excused due to a "force majeure" event.

⁵⁵ See *In re War Eagle Constr. Co.*, 283 B.R. 193, 201 (S.D. W. Va. 2002).

⁵⁶ CERCLA requires the inclusion of stipulated penalty provisions in RD/RA CDs. See 42 U.S.C. § 9621(e)(2) ("Each [CD] shall also contain stipulated penalties for violations of the [CD] . . ."); see also *Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees*, EPA Office of Enforcement and Compliance Monitoring (Sept. 21, 1987), available at <http://www2.epa.gov/enforcement/guidance-use-stipulated-penalties-hazardous-waste-consent-decrees>. As a matter of policy, EPA strives to also include such provisions in other types of CERCLA settlements as well, except for settlements with *de minimis* parties. See, e.g., *Revised Model Administrative Settlement Agreement and Order on Consent for Removal Actions*, ¶¶ 46-55, OSRE (Jan. 30, 2007), available at <http://www2.epa.gov/enforcement/model-administrative-settlement-agreement-and-order-consent-removal-actions>; EPA and DOJ *Model CERCLA § 107 Consent Decree for Recovery of Past Response Costs*, ¶ 11 (Sept. 26, 2014), available in the Past Cost category of the Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>.

In drafting CERCLA settlement agreements, EPA usually strives to ensure that the stipulated penalty provision covers all of the settlement’s obligations, including FA obligations. When case teams list out violations and compliance milestones subject to the stipulated penalty provisions during the settlement drafting process, the following language should be included to capture FA-related obligations:

“Establishment and maintenance of financial assurance in compliance with the timelines and other substantive and procedural requirements of Section [insert section number] (Financial Assurance).”⁵⁷

Meanwhile, in the FA section of the settlement document, case teams should delineate various FA milestones (e.g., due dates for the submission of FA mechanisms to EPA and for annual submissions regarding the financial test and corporate guarantee FA options).

2. Statutory and civil penalties

In addition to stipulated penalty provisions, EPA normally seeks to have CERCLA settlements preserve the Agency’s ability to seek statutory penalties for settlement violations.⁵⁸ CERCLA settlements usually give EPA the option of pursuing stipulated penalties, statutory penalties, or both in the event of a violation of the settlement conditions.⁵⁹

Finally, statutory penalties are available in connection with violations of UAOs, including UAO provisions for FA. EPA can seek statutory penalties up to \$37,500 per day against any person who, without sufficient cause, willfully violates, or fails or refuses to comply with a UAO.⁶⁰ EPA can also seek punitive damages when it incurs response costs as a result of UAO non-compliance.⁶¹

E. Use of CERCLA Section 104(e) to collect additional FA information

EPA is authorized to request various types of information from PRPs to facilitate cleanups, including “[i]nformation relating to the ability of a person to pay for or to perform a cleanup.”⁶² Beyond helping EPA identify PRPs, CERCLA § 104(e) information requests aid in the assessment of PRPs’ financial viability when reviews of publicly-available information are inconclusive. Thus, when questions arise regarding FA matters and informal attempts to obtain

⁵⁷ See Model RD/RA CD, *supra* note 11, at ¶ 63.b(2).

⁵⁸ See 42 U.S.C. § 9622(l).

⁵⁹ See, e.g., Model RD/RA CD, *supra* note 11, at ¶ 72 (preserving CERCLA § 122(l) penalty option for violations of obligations not covered by the settlement’s stipulated penalties’ section and for “willful” violations of obligations covered by such section).

⁶⁰ See 42 U.S.C. § 9606(b)(1); see also *Revised Penalty Matrix for CERCLA §106(b)(1) Civil Penalty Policy*, OECA (July 17, 2009), available at <http://www2.epa.gov/enforcement/guidance-updated-penalty-matrix-cercla-section-106b1-civil-penalty-policy>.

⁶¹ See 42 U.S.C. § 9607(c)(3); see also Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66,643 (Nov. 6, 2013) (to be codified at 40 C.F.R. pt. 19).

⁶² 42 U.S.C. § 9604(e)(2)(C).

relevant information from PRPs are insufficient, case teams should consider sending a CERCLA § 104(e) request to elicit information that would be responsive to such questions.⁶³

IV. Conclusion

Along with other provisions in settlements and UAOs, FA requirements place the financial burden of cleanups on PRPs and ensure that sufficient financial resources are in position to complete cleanups once PRPs commence such work. By compelling PRPs to internalize their environmental cleanup costs, FA requirements therefore minimize costs borne by taxpayers at sites where PRPs default on their cleanup obligations.

Regions and case teams are encouraged to:

- Strategize on how to address FA matters prior to entering into settlement negotiations or issuing UAOs;
- Use the FA resources available on the Agency's internet and intranet;
- Become familiar with model documents, tip sheets, and sample mechanisms developed for CERCLA settlements and UAOs;
- Use the recommended best practices attached to this guidance (Appendix C); and
- Seek Headquarters' assistance as needed, but especially for novel or nationally-significant FA issues.

⁶³ For lists of questions under specific categories (including financial) that were compiled to assist staff tailor information requests to PRPs and their involvement at sites, see <http://www2.epa.gov/enforcement/superfund-104e-information-request-questions-category>. For assistance with drafting 104(e) requests relating to FA matters, Regions are encouraged to contact OSRE's FA team (for contact information, see Appendix A).

LIST OF APPENDICES

- APPENDIX A: Additional FA Resources and Contacts
- APPENDIX B: Practical Considerations Regarding Financial Test and Corporate Guarantee FA Options
- APPENDIX C: Recommended Best Practices for Documentation and Data Management of Financial Assurance Obtained Pursuant to CERCLA Settlement Agreements and Unilateral Administrative Orders

Appendix A Additional FA Resources and Contacts

EPA has developed numerous resources and employs different outlets to assist federal and state regulators with their FA compliance and enforcement efforts, including the following:

1. **OSRE's FA Team intranet page:** contains team members' contact information, information about OECA-led monthly FA calls, and a link to tip sheets to educate Regional staff on FA mechanisms, as well as model FA language and sample language for use in FA mechanisms.⁶⁴
2. **Financial Responsibility Enforcement Tool (FRET):** an online compilation of FA information, policies, and step-by-step instructions on reviewing various FA mechanisms.⁶⁵
3. **Monthly FA calls:** coordinated by OECA to provide a venue for federal and state regulators to collectively discuss FA-related concerns and issues.⁶⁶
4. **Continuation of FA as an OSRE enforcement priority:** from 2005 to 2007 and then again from 2008 to 2010, EPA identified FA as a national enforcement initiative for the CERCLA and RCRA enforcement programs.⁶⁷ With the return of FA to the core CERCLA enforcement program in 2011, FA compliance remains an OSRE enforcement priority as it both protects against the risk of default by PRPs on their CERCLA cleanup obligations and helps EPA preserve its limited resources.

⁶⁴ See <http://intranet.epa.gov/oeca/osre/>. For sample FA mechanisms that are also publicly available on the EPA website, see the Financial Assurance categories of the Cleanup Enforcement Model Language and Sample Documents Database, available at <http://efpub.epa.gov/compliance/models/>.

⁶⁵ FRET is only available to federal and state regulators. To request access to FRET, please contact an OSRE FA team member.

⁶⁶ For information about participating on monthly FA calls, please contact an OSRE FA team member.

⁶⁷ EPA sets national enforcement initiatives every three years to focus resources toward the most significant environmental problems and human health challenges identified by EPA staff, states, tribes, and the public. As part of previous national priorities, EPA assessed the use of FA mechanisms, reviewed numerous site-specific FA documents, and commenced enforcement actions as appropriate to ensure compliance with FA requirements.

Appendix B

Practical Considerations Regarding Financial Test and Corporate Guarantee FA Options

Case teams considering allowing the use of a financial test or corporate guarantee, or reviewing submissions associated with the two FA mechanisms, may want to consider the following practical points:

- Audited financial statements with clean opinions are important to ensure the integrity of the financial data in a submission.
 - Private companies' financials are not required by the Securities and Exchange Commission (SEC) to be audited, so Regions should verify that private companies seeking to use the financial test or corporate guarantee are willing to provide audited financials.
 - Quarterly filings—even for public companies—are not typically required by the SEC to be audited, so Regions should be aware of other sources of information to monitor companies' financial health (see last bullet and related sub-bullets below).
 - Adverse opinions and disclaimers of opinion should disqualify a financial test or corporate guarantee applicant.
 - Qualifications of opinions should be investigated further.
- In addition to publishing current ratings, ratings agencies maintain “watch lists” that give an indication of possible future downgrades.
 - Therefore, if the financial test or corporate guarantee is used by a company, Regions should monitor the watch lists to see if that company is added.
- Regions should be aware of how a bond relied upon by the company to satisfy the financial test or corporate guarantee fits into the company's capital structure.
 - Regions can have greater confidence in bond ratings for debenture or unsecured bond issuances rather than those secured by collateral.
 - Unsubordinated (senior) debt may receive a more favorable rating than subordinated debt from the same company.
 - In general, a company's senior unsecured debt issuance usually has the same rating as the company's long-term corporate credit rating.
- Routine monitoring of the relevant company's financial (annual and/or quarterly) statements and the business press is advisable. Among other things, Regions should be aware of the following indicators of potential financial trouble:
 - An omission or cut in the company's dividend payouts;
 - The delisting (i.e., removal) of a company's security from an exchange;
 - News of a merger, acquisition, or divestiture involving the company;
 - A negative change (i.e., downgrade) in the rating of the company's bond(s);
 - Financial losses and impairments;
 - Sharp stock price decreases; and
 - Eroding leverage and coverage ratios over time.

- Negative attestations from auditors (e.g., a statement in the auditor’s report that “nothing came to [his/her] attention that caused [him/her] to believe that the specified data should be adjusted”) are not allowed under current accounting protocols.
 - An “agreed-upon procedures engagement” report, prepared in accordance with applicable statements on standards by the American Institute of Certified Public Accountants (AICPA), which describes the procedures performed by and related findings of the auditor, including whether or not any discrepancies were found, would be more appropriate for purposes of CERCLA FA in the enforcement context.⁶⁸

⁶⁸ See EPA Office of Solid Waste, *Obsolete Language in the Financial Test for Subtitle C Treatment Storage and Disposal Facilities* (Feb. 27, 1997), available at [http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/C68C99D730932BE28525670F006C2B4A/\\$file/14066.pdf](http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/C68C99D730932BE28525670F006C2B4A/$file/14066.pdf); see also AICPA, *Statements on Standards for Attestation Engagements: Agreed-Upon Procedures Engagements*, AT Sec. 201, available at <http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AT-00201.pdf>.

Appendix C
Recommended Best Practices for Documentation and Data Management of Financial Assurance Obtained Pursuant to CERCLA Settlement Agreements and Unilateral Administrative Orders

I. PURPOSE

These recommendations are intended to aid Regions in formulating a plan or updating existing procedures to address financial assurance (FA) documentation and data management relating to FA requirements in CERCLA settlement agreements and unilateral administrative orders (UAOs).

II. BACKGROUND

FA requirements are imposed on potentially responsible parties (PRPs) in CERCLA settlements and UAOs to ensure that funds are available to complete cleanups. The settlement or UAO will specify the PRP's FA obligations. FA mechanisms available to PRPs in a given settlement or UAO could have different documentation requirements: self-insurance-type mechanisms, such as financial tests and corporate guarantees, call for initial and periodic submissions to EPA to demonstrate the relevant entity's financial strength vis-à-vis its environmental obligations; third-party provided mechanisms, such as trust funds, letters of credit, surety bonds, and insurance policies, usually involve an initial submission of the mechanism to EPA and subsequent submissions to account for any necessary changes (e.g., changes to the underlying cost estimate) or requests to cancel or replace the existing FA mechanism.

III. ROLES AND RESPONSIBILITIES

Regions should clearly define the roles and responsibilities of the various offices and staff involved in overseeing FA requirements to ensure that compliance tracking is successful. Therefore, Regions should designate staff responsible for FA matters through each step of the process. Moreover, Regions should limit access to FA submissions to appropriate staff. At a minimum, Regions should plan for the following FA-related undertakings, each of which is examined in greater detail below: (A) receiving FA submissions; (B) maintaining FA files; (C) reviewing FA submissions and monitoring FA compliance; (D) analyzing FA data and monitoring continued FA compliance; (E) demanding funds or work guaranteed by FA mechanisms; and (F) releasing FA documents.

A. Receiving FA Submissions

Regions should develop internal procedures stating how FA submissions will be handled when submitted to EPA. First, Regions should decide who should receive FA documentation: the person(s) receiving FA documentation will vary by Region, but generally could be a remedial project manager, an on-scene coordinator, a financial analyst, or staff within the legal or financial offices. The appropriate designee should be specified in the FA section of the settlement or UAO.

Second, Regions should employ a receipt log to record key information regarding any FA documentation received by EPA. These log books should record information such as the date of receipt, the type of mechanism at issue, the name of the PRP who submitted the mechanism, the amount of the mechanism, and the third-party provider of the mechanism.

B. Maintaining FA Files

FA submissions, including original mechanisms and related correspondence, should be maintained based on Regional conventions in a uniform, easily searchable way (e.g., by site and/or PRP). The safekeeping of third-party FA mechanisms is especially important: some third-party FA providers require originals to be presented to draw upon the mechanism, so all such mechanisms should be stored in a secure location—ideally a fireproof safe.

FA submissions may be claimed by PRPs as confidential business information (CBI) and should be treated accordingly until CBI determinations can be made. Any designated staff should be aware of CBI claims and should follow applicable regulations⁶⁹ to ensure the proper use and handling of CBI.

C. Reviewing FA Submissions and Monitoring FA Compliance

Regional offices should coordinate the review of FA submissions to monitor PRPs' compliance with FA obligations. FA reviews should be performed both initially and over time. Periodic reviews are usually performed on an annual basis, though it may be necessary to do so more frequently due to site-specific circumstances. Regions should determine who will have the lead responsibilities for reviewing and monitoring FA submissions.

Shortly after receiving an FA submission, the designated reviewer should perform an initial review of the FA document for conformity with the applicable requirements.⁷⁰ The reviewer should verify, among other things, that:

- All FA documents submitted are signed.
- The text of the FA submission follows or is substantially identical to EPA's sample FA mechanism language.⁷¹
- The amount of the FA mechanism(s) is at least equal to the cost of work to be performed.

⁶⁹ See, e.g., 40 C.F.R. §§ 2.211, 2.310 (2014).

⁷⁰ If reviewers have questions concerning whether a mechanism is in compliance, they can access the Financial Responsibility and Enforcement Tool (FRET), which is an online compilation of FA information that includes step-by-step instructions on reviewing various FA mechanisms. FRET is username and password protected. To request access to FRET, please contact an OSRE FA team member.

⁷¹ For additional information, see the Financial Assurance categories of the Cleanup Enforcement Model Language and Sample Documents Database, available at <http://cfpub.epa.gov/compliance/models/>.

- Contact information (e.g., name, title, address, phone number, email address) for relevant EPA, PRP, and/or third-party FA provider personnel is clear or easily obtainable.
- In the case of a trust fund or letter of credit, the identified financial institution is authorized to issue such mechanisms and is regulated and examined by a federal or state agency.
- In the case of a surety bond, the surety provider is listed on U.S. Treasury Circular 570 and that the amount of the bond is within the provider's underwriting limitation.
- In the case of insurance, the insurer is licensed or eligible to provide insurance.

As stated above, even FA mechanisms that are not required to be renewed annually should be reviewed periodically to ensure, for instance, that the face amount is sufficient to cover the current cost estimate at the site.

If additional information is needed, the submitter of the FA document should be contacted. If the reviewer determines that an FA submission does not comply with an FA requirement, s/he should coordinate with relevant legal and/or program staff, and their management as appropriate to determine the appropriate outreach or enforcement action, such as a notice of violation or an assessment of penalties. Regions should coordinate with the Department of Justice regarding contemplated judicial enforcement actions.

Moreover, FA information should be entered into EPA's Superfund Enterprise Management System (SEMS). It is important to track FA submissions, not only to help with monitoring compliance for individual instruments, but also so that integrated FA information can be used to detect broader FA issues, such as ensuring that a PRP has adequate FA coverage across Regions and being able to respond quickly if a PRP or financial institution defaults on its FA obligations. Populating SEMS with FA-related data allows EPA to monitor the status of various FA requirements in the CERCLA program.⁷²

D. Analyzing FA Data and Monitoring Continued FA Compliance

FA data in SEMS should be reviewed regularly to ensure accuracy and to track compliance. Any incomplete FA-related data fields in SEMS, such as FA expiration dates, should be identified during the review process and populated when available.

Likewise, FA reviews should identify any FA mechanisms set to expire and any delinquent documents. The staff responsible for conducting SEMS reviews should provide the assigned FA reviewer with a reminder of FA documents that have upcoming expiration dates and should notify such individual(s) of any delinquent documents.

E. Demanding Funds or Work Guaranteed by FA Mechanisms

⁷² When entering data into SEMS, Regions should take appropriate measures to properly safeguard any potential or actual CBI and to protect against its improper disclosure.

If necessary (e.g., upon an EPA work takeover in settlement scenarios), case teams should call upon FA providers, in accordance with the terms of the applicable enforcement document and FA mechanisms, to fund or perform cleanup work. Assuming the PRP neither timely cures a violation which gave rise to an EPA request for guaranteed FA resources nor provides an alternate FA mechanism within the allotted time period before an impending mechanism cancellation, the case team should communicate with the PRP and/or FA provider to address any issues that arise in connection with the PRP's FA obligations. When a case team submits a request to an FA provider seeking funds or work guaranteed by an FA mechanism, the case team should ensure, among other things, that EPA's request is timely, includes appropriate language or documentation (e.g., a "sight draft" for a drawdown on a letter of credit), and comes from an authorized Regional official.

F. Releasing FA Documents

FA documents should only be released by EPA after a request for release has been reviewed/or and a final determination has been made by EPA that a release of an FA mechanism is appropriate per the terms of the relevant settlement or UAO. If an alternate (i.e., substitute) FA mechanism has been received and the FA reviewer has determined that the replacement mechanism is adequate, the replaced FA mechanism can be returned to the relevant financial institution. Once an FA mechanism has been released, SEMS should be updated to record the replacement FA mechanism and its details or to reflect that FA is no longer required.