

**“Mine Reclamation Bonding – from Dilemma to Crisis to Reinvention:
What’s a State Regulator to Do?”**

Presented by

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Introduction¹

Thank you for the opportunity to participate in the 2014 EMFL Winter Workshop on Energy Law. I am appearing today on behalf of the Interstate Mining Compact Commission. For those who may be unfamiliar with us, IMCC is a multi-state governmental organization representing the natural resource and environmental protection interests of its 26 member states. Our members serve as the lead agencies for the regulation of mining activity within their borders and our membership reflects both the diversity of mineral production and mining conditions across the country.

Over the course of the past 35 years since the enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA)², bonding (or financial assurance)³ programs related to the reclamation of coal mining operations have undergone a series of adjustments that reflect the changing nature of both the coal and surety industries. Some changes have involved small refinements; others represent new, innovative approaches that were not on anyone's radar screen in the early days of SMCRA's implementation. In many respects, the bonding program under SMCRA has served as a microcosm of the larger financial and economic challenges faced by the country as a whole, beginning with the "bonding dilemma" of the mid-90's when bankrupt surety companies and under-funded bond pools caused great concern, to the "bonding crisis" of the early 2000's as the surety and insurance industries responded to the significant losses associated with 9/11 and catastrophic weather events, to the "bonding challenges" that we face today as a result of corporate restructuring and unanticipated environmental conditions and priorities, especially related to water quality and long-term treatment scenarios.

The focus of my remarks today will be a discussion of some of the recent challenges being faced and addressed by state government agencies that have primary responsibility for implementing SMCRA through approved regulatory programs. I will begin with a quick, admittedly cursory overview of the bonding requirements under SMCRA⁴ and then move into a more detailed analysis of four

¹ I wish to acknowledge IMCC Intern Ryan Ellis for his work and contributions to this paper, as well as the input from several of our member states who provided information for or review of sections of the paper.

² 30 U.S.C § 1201 et seq.

³ The term "bonding" or "reclamation bonding" is also often referred to as "financial assurance", "financial responsibility", "financial warranty", or "reclamation surety".

⁴ For a more extensive discussion of SMCRA's bonding requirements, as well as federal financial assurance requirements under other federal laws, see Gorton, William T. III, State and Federal Reclamation Bonding Programs: Lessons Learned and Current Challenges, as presented at the IMCC 2013 Bonding Workshop in St. Louis, MO (available at www.imcc.isa.us under "IMCC Meeting and Workshop Presentations", along with other excellent presentations on bonding; Brancard, Bill and Leach, Carol, Structuring Financial Assurance For Reclamation: A Regulators

key issues that states are facing today: 1) the development and use of trust funds for the long-term treatment of water quality at reclaimed mines; 2) the use of self-bonding and corporate guarantees; 3) the use of alternative bonding systems, i.e. bond pools; and 4) the desire of landowners for continuing financial assurance where a permit transfer is concerned or where a bond has been or is about to be released and the lease terminated or the land sold. I will also provide an update on developments concerning financial assurance for the hardrock mining industry.

Background

The basic structure of the bonding program under SMCRA revolves around the statutory requirement that a coal mine operator receiving a permit must also provide a performance bond to the regulatory authority that insures the faithful performance of all permit and other regulatory requirements.⁵ The bond must cover the disturbed areas within the permit boundary and all successive increments, and may include some areas over underground mines, often referred to as “shadow areas”, where subsidence or other impacts are anticipated or actually occur. The amount of the bond should reflect the probable difficulty of reclamation (generally the “worst case scenario” related to land disturbance) and must be sufficient to assure completion of the reclamation plan if the work had to be performed by the regulatory authority. Bond amounts vary from state to state but in no case can be less than \$10,000 for any one permit.⁶ Liability under the bond is for the duration of the surface coal mining operation, but can be released in phases based on the various stages of reclamation. Bond forms may include surety, collateral (such as cash, securities, letters of credit and CDs), self-bonds and corporate (or third party) guarantees.⁷ Alternative bonding mechanisms can include bond pools and trust funds.⁸

Representing as I do the states that regulate the mining industry, my views are admittedly from the perspective of a state government agency, whose primary interest is to ensure that the state will have sufficient funds to complete the reclamation should the operator default and to thereby protect the citizens and taxpayers of the state from being saddled with unfunded liabilities. It is this same interest that has motivated several federal government agencies to develop or propose robust financial assurance programs where mineral extraction is concerned, including the Bureau of Land Management⁹, the U.S.

Perspective, 52 *Rocky Mt. Min. L. Inst.* 19-1 (2006); Dal Moellenberg, “Technical, Legal, and Financial Strategies for Effective Mine Closure,” 51 *Rocky Mt. Min. L. Inst.* 18-1 (2005).

⁵ The reclamation bonding requirements promulgated by the Office of Surface Mining under SMCRA can be found at 30 C.F.R Part 800.

⁶ 30 C.F.R. § 800.14

⁷ 30 C.F.R. § 800.12

⁸ 30 C.F.R. § 800.11(e)

⁹ 43 C.F.R. Part 3809

Forest Service ¹⁰ and the U.S. Environmental Protection Agency. ¹¹ More on this later.

Long-Term Treatment Trust Funds

While the bonding component of state coal regulatory programs has seen its share of challenges over the years, several recent developments are causing states to consider new approaches and alternatives, while reconsidering others. Most reflect the state of the economy in general, from the inflationary impacts related to the cost of reclamation to the consolidations within the coal industry and in some cases recent bankruptcies. The increasing occurrences of unanticipated impacts to water quality from acid mine drainage or the presence of chemical constituents of concern like selenium are also adding to the complexity of the equation, since traditional bonding approaches like surety do not generally work well for these types of situations. As a result, states are investing more heavily in mechanisms such as trust funds for long-term treatment scenarios and are taking a hard look at the integrity and continued use of bond pools that can be devastated by a single long-term treatment forfeiture.

In Pennsylvania, for example, the state was facing the necessity of moving several coal operators to full cost bonding following the state's termination of its bond pool. Where long-term treatment obligations related to water quality were involved, this move was likely to force operators to forfeit any existing bonds and walk away from their obligations without some other form of financial assurance in place. The bond pool itself was inadequate to cover these liabilities. Pennsylvania therefore developed the idea of trust funds that could be negotiated via consent agreements between the Commonwealth and an operator to insure continued mining and reclamation, while guaranteeing a source of funding for future obligations associated with long-term treatment.¹²

One of the primary reasons that more states are seriously considering trust funds is that traditional surety bonds, or similar instruments, were never designed for long-term reclamation obligations like water treatment but instead were focused on shorter term and very defined obligations that had a high certainty for eventual release following the completion of reclamation (generally based on success of revegetation of the site). Ordinarily, bonding underwriters

¹⁰ 36 C.F.R. Part 228 and Proposed Rules at 73 Federal Register 15694 (March 25, 2008) (which were never finally promulgated)

¹¹ EPA is considering the promulgation of rules for financial responsibility at hardrock mines pursuant to Section 108(b) of the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, et seq.

¹² The Pennsylvania analog to SMCRA was amended to state: "The department may establish alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program. These mechanisms may include, but are not limited to, the establishment of a site specific trust fund, funded by the operator for the treatment of post mining discharges of mine drainage." 52 P.S. §1396.4(d.2).

will not provide a surety bond if it is determined that a site will have long-term pollutional discharges since the bond will likely never be released – an outcome that a bonding company will do its best to avoid. This is largely because reclamation bonds, unlike insurance, are intended to function primarily as credit transactions or accommodations in which the surety anticipates no loss.

A trust fund is an account managed by a third party, the “trustee”, with funds provided by the operator (or “settlor”) and payable to the beneficiary (the state or federal agency) when the operator fails to perform. The operator, agency and account manager will enter into an agreement specifying the management of the account and the investment and distribution of funds. By using this mechanism, the agency and the operator can overcome the limits placed on cash accounts and allow for more aggressive investment strategies over time. The accounts normally provide for appreciation of the funds, with contributions from the operator, and therefore can compensate for increased reclamation costs or mine expansions. They also provide an opportunity to more effectively provide for longer term reclamation obligations, like water treatment.¹³ There are many factors to review when developing a trust program, including but not limited to the basis and methodology for estimating costs, investment policies to protect the fund but optimize returns, selection of an investments manager, and determining tax status and the extent of agency control.¹⁴

In addition to Pennsylvania, the states of Ohio, Kentucky, West Virginia and Utah have explored the use of trust funds. The state of Alaska is seriously considering the adoption of a similar approach for both coal and hardrock mining operations¹⁵. The Bureau of Land Management specifically requires the use of a trust fund where long-term treatment or other long-term post-mining maintenance requirements attend hardrock mining operations under BLM’s authority pursuant to the Federal Land Policy Management Act (FLPMA)¹⁶. The federal program administered by the Office of Surface Mining in Tennessee includes a robust trust fund mechanism for long-term treatment scenarios.¹⁷ In its final rule that established the use of trust funds, OSM commented as follows:

¹³ Under SMCRA, coal mine permit applications must provide a hydrological reclamation plan which includes treatment facilities if necessary. 30 C.F.R. § 780.21

¹⁴ See, INTERNATIONAL COUNCIL ON MINING & METALS, FINANCIAL ASSURANCE FOR MINE CLOSURE AND RECLAMATION, Appendix (2005).

¹⁵ With regard to hardrock mining sites, trust funds have been used by EPA in the context of CERCLA financial assurance requirements and are intended to ensure that adequate funds are available to cover costs pursuant to superfund settlements. *See*, www.epa.gov/compliance/resources/policies/cleanup/superfund/fa-trust-mod.pdf.

¹⁶ When BLM identifies a need for it a mining operator must establish a trust fund or other funding mechanism available to BLM to ensure the continuation of long-term treatment to achieve water quality standards and for other long-term post mining maintenance requirements. 43 C.F.R. §3809.552(c).

¹⁷ 30 C.F.R. § 942.800(c).

A system that provides an income stream may be better suited to insuring the treatment of long-term pollutional discharges, such as AMD [acid mine drainage], than conventional bonds. Surety bonds, the most common form of conventional bond, are especially ill-suited for this purpose because surety companies normally do not write a bond when there is no expectation of release of liability.¹⁸

As the trust fund concept is gaining acceptance nationwide, there remain certain questions regarding how and when they are best utilized. As has been discussed above, most water quality issues stem from unanticipated pollutional discharges, since an expectation of long-term water pollution generally precludes a permit's issuance. The specifically negotiated, stand-alone reclamation bond will not cover long-term treatment because it is not in its nature to do so, and again, the discharges are unanticipated. Therefore there is a practical issue which still needs consideration, and that is: how and when should financial assurances be required specifically for water pollution issues? And further, if a trust is to be established to cover a possibility of long-term treatment obligations, then when should the permittee be required to begin funding the trust?

In New Mexico, the concept of "net present value" is used to discern appropriate bond amount for the possibility of establishing a trust fund. The first step is to chart out 100 years of long-term water treatment after the reclamation is otherwise complete. Next, the agreed upon inflation rate is applied. This figure is then discounted back to the present, and that is the amount of bond required. If the bond needs to be called in later, the trust fund is then started. New Mexico uses returns in the bond market in order to be conservative in its projections of the actual fund amount. A historical period of around 20 years is used to compare inflation to bond returns and to thereby decide on the appropriate figures.

Several lessons have been learned along the way regarding the use of trust funds at both the state and federal level. Perhaps one of the most practical is the use of a team approach for the design, establishment and operation of the treatment trust. Working together with the manager of the trust, the actual treatment system design should be worked out using engineers, hydrologists and biologists resident within the agency to answer questions such as goals of the treatment system, functionality, maintenance, contingencies and anticipated costs. Moving on from there, a team consisting of the trust manager, economists and lawyers can review the financial instrument(s) that will constitute the trust and ponder such questions as the best mix of investment vehicles, inflation rates, the anticipated market volatility and return on investment. Other issues include how trust fund balances and overall performance will be tracked and how fund

¹⁸ 72 Fed. Reg. 9,618 (Mar. 2, 2007).

excesses will be handled. Finally, with respect to legal language, a team of lawyers, managers, engineers and hydrologists should investigate questions such as what happens if the operator is no longer viable; who has the legal right of entry, what becomes of the existing permit, and how unexpected events will be handled?

The states have also learned that a yearly review of treatment trusts is essential. Review areas should include treatment system performance; annual actual expenditures and how they matched up with estimates; trust fund performance; and a review of the legal agreement language to insure that there are no updates or adjustments required.

One example of a successful trust established in 2001 specifically aimed at addressing mining and natural resources reclamation obligations and coordinating water treatment in numerous states is the Clean Streams Foundation, Inc. (CSF), a nonprofit 501(c)(3) organization. The CSF currently acts as the trustee over more than 40 different environmental trust accounts and sub-accounts having a total asset value in excess of \$100 million. The assets of each trust account and/or sub-account are invested based upon the purposes, objectives, and projected cash flow requirements of that particular account. The CSF also manages more than 20 treatment systems and facilities, where the operator has ceased to treat polluted mine drainage due to corporate dissolution or bankruptcy. Recently, the CSF spent more than \$3.5 million treating water with trust account earnings that would otherwise have been a taxpayer burden or left untreated¹⁹. See, www.cleanstreams.net

Self-Bonding and Corporate Guarantees

Another evolving issue for the states is the use of self-bonds and corporate guarantees. As defined by OSM's permanent program regulations, a self bond means, "an indemnity agreement in a sum certain executed by the applicant or by the applicant and any corporate guarantor and made payable to the regulatory authority, with or without separate surety."²⁰ At present, 11 states allow for the use of these types of bonding mechanisms, with a handful of states relying heavily on their use for over 50% of outstanding bonding obligations including Alaska, Indiana, New Mexico, Texas and Wyoming.

¹⁹ The CSF has been involved and received assets in trust as a result of a number of high profile bankruptcies including for example:

• In Re: LTV Steel Company, Inc., U.S. Bankruptcy Court of the Northern District of Ohio, Bankruptcy Case No. 00-43866; • In Re: Barnes & Tucker Company, U.S. Bankruptcy Court of the Western District of Pennsylvania, Bankruptcy Case No. 00-27039-BM; • In Re: Kaiser Aluminum Corporation, U.S. Bankruptcy Court of Delaware, Bankruptcy Case No. 02-10429 (JKF).

²⁰ 30 C.F.R. § 800.5

The concept of self-bonding allows a company to rely on its own financial strength to provide assurance that it can and will meet its reclamation obligations. Self-bonding and corporate guarantees appear in various forms across jurisdictions. SMCRA expressly allows the concept²¹ whereas under the Federal Land Policy Management Act (FLPMA), the Bureau of Land Management (BLM) does not.²² Self-bonding generally involves the operator providing a certified financial statement that meets certain tests established by the agency. Often, part of the test requires a guarantor. The guarantor can be the company itself, but is often another corporate entity within the family tree of the company seeking to self-bond. Generally speaking, a “Parent” guarantee means that the guarantor is only one level removed, with the self-bond-seeking company as a direct subsidiary. A “Third Party” guarantee generally means that the guarantor is several corporate levels removed, and often also means that the guarantor is of a distinct, separate corporate family, though not necessarily.

The financial tests for self-bond or corporate guarantees vary considerably across state and federal jurisdictions (as do definitions of types of guarantee). Some tests focus on the credit ratings issued by nationally recognized organizations such as Standard and Poor’s or Moody’s related to the current outstanding senior obligations of the company. Generally, the ratings must be investment grade, but some agencies require higher ratings.²³ In addition to the credit rating test, or as a separate test, agencies can require a variety of minimums or ratios to be met.²⁴ These include a minimum net worth amount, a minimum amount or percentage of assets in the United States, a minimum ratio of net worth to the proposed financial assurance amount, a positive net income, or minimum ratios of assets to liabilities or of liabilities to net worth or shareholder’s equity²⁵.

Unlike surety bonds or letters of credit, self-bonds or corporate guarantees do not allow the regulator to lay claim to a specific financial asset in the event that the operator cannot meet its reclamation obligations. Further, corporate guarantees require considerable administrative oversight and financial expertise that is either resident within the agency or through third party auditors²⁶. Of

²¹ 30 U.S.C. § 1259(c).; 30 C.F.R. § 800.23

²² 43 C.F.R. § 3809.570

²³ E.g., Colorado requires an “A” rating, Section 34-32-117(3)(f)(VI) C.R.S, while New Mexico requires a Standard & Poor’s “BBB” rating or Moody’s “Baa” rating, 19.10.12.1208(G)(8) NMAC

²⁴ See, e.g., Nevada Administrative Code (NAC) 519A.350; 2 CCR 407-4 Rule 4.10 (Colorado); 19.10.12.1208(G)(8) NMAC (New Mexico)

²⁵ 30 C.F.R. § 800.23(b). Tangible net worth is defined as the difference between total assets and total liabilities less intangibles such as goodwill and the rights to patents or royalties. 30 C.F.R. §800-23(a). Fixed assets are defined as plant and equipment and do not include land or coal in place. Id.

²⁶ BONDING FOR FEDERAL LANDS, 73 Fed. Reg. 15694 (March 25, 2008).

particular concern to the states is the situation where a company that is self-bonded experiences financial difficulties that place the company in default of the solvency requirements. Such a circumstance faces the state agency with a classic Catch-22: if the state chooses to insist on alternative financial assurances or collateral as a result of the company's diminished financial situation, the threat to the company's financial solvency would only increase. If the company is unable to secure replacement bonds, the state could find itself saddled with a significant potential liability for the reclamation obligation if a workable alternative cannot be found.

While the states who currently accept self-bonds or corporate guarantees have not been faced with this particular scenario, there are increasing concerns about some rather large companies being unable to continue meeting their financial solvency tests given recent restructuring and/or the downturn in the coal markets, which in turn are often due to fuel switching or expanded regulatory requirements related to the burning of coal. This concern has been exacerbated by the fact that a few larger mining companies that self-bond have commercial interests in several states and agency decisions about accepting a self-bond are generally focused intra-state, not nationwide. Without a full disclosure of the full scope of a company's operations and self-bonds or corporate guarantees nationwide, a state may be obtaining a limited picture of the company's bonded capacity and potential impacts on its overall financial health, to the detriment of the state should a series of defaults occur.

As a result, several states are reconsidering whether to accept self-bonds or corporate guarantees in the future and are considering restructuring their existing regulations to either limit or completely eliminate this bonding mechanism. Where these bonds or guarantees will continue to be accepted, expanded financial tests and oversight reviews are pretty much a certainty, with the cost of undertaking financial reviews and audits being passed on to the company seeking to self bond. In this regard, one state has developed a series of financial requirements that can be checked periodically for purposes of tracking the health of the self-bonded companies. Some states report having success requiring a third party guarantee with the key requirement that the guarantee not come from a company within the same corporate family tree as the permittee. Another new option being discussed is the use of a sight draft, which is a bill of exchange that is payable at sight so the money may be immediately collected upon presentment of the draft to the drawee named in the instrument.

The states are certainly aware of the fact that there are significant benefits for financially stable companies to utilize self-bonds, not the least of which is that it allows a company to avoid tying up capital in the form of collateral and paying premiums under traditional surety or letter of credit relationships.²⁷ Allowing a company to self bond also reduces the aggregate cost of bonding and reduces

²⁷ Brancard, Bill and Leach, Carol, Structuring Financial Assurance For Reclamation: A Regulators Perspective, 52 *Rocky Mt. Min. L. Inst.*, 19-1 (2006), pg.18

administrative difficulties associated with using a third party bonding company. And as larger, better leveraged companies who qualify for self-bonds utilize this mechanism, as opposed to using surety bonds, it helps to maintain the capacity for available surety bonds for the balance of the mining industry. Given that there are limits on this capacity, there has been some concern about what the impacts for the mining industry would be if companies who are currently self-bonded are required to obtain sizeable surety bonds as replacement for their reclamation obligations.

From the industry perspective, self-bonding certainly holds many clear advantages. Especially in the wake of the “Surety Bond Crisis”, which caused a significant reduction in the availability and affordability of surety bonds for mining companies, self-bonding and corporate guarantee seemed like a reasonable solution to replace these missing surety bonds. However, government agencies and the public interest community have a different set of priorities based on their distinct perspectives, and these should also be taken into account. Government agencies prefer financial assurance tools that provide certainty and security.²⁸ This is because the agencies’ essential goal is to ensure that money is available for reclamation in the event of a default or bankruptcy. To that end, self-bonds and guarantees are the least favored option. The public interest community echoes the agencies concerns, arguing that financial assurance mechanisms like self-guarantees are simply of little value when the operator defaults or declares bankruptcy, which defeats the primary purpose of the bond.²⁹

By and large, the trend has been to restrict the use of guarantees. Some agencies including BLM, eliminated guarantees as an acceptable form of financial assurance.³⁰ Agencies not allowing the use of guarantees have generally resisted pressure to change their stance. Some states, such as New Mexico, where guarantees are allowed and provide significant financial assurance coverage, have placed restrictions on their use. New Mexico followed the lead of Nevada and now limits guarantees to no more than 75 percent of an operation’s obligation. Nevada added an annual review of the guarantee to determine if the operator has adequate security.

More specifically, in New Mexico, where corporate guarantees comprise about 67% of the state’s financial assurance for both coal and non-coal, the state has very different standards for coal and non-coal self-bonds/guarantees. The coal rules are largely a copy of the federal self-bonding rule at 30 CFR 800.23 and have remained unchanged for many years. The cyclical metals industry gave legislators and regulators more pause when the New Mexico

²⁸ Id. at pg. 18

²⁹ Id. at pg. 21

³⁰ BLM stopped accepting new corporate guarantees as of January 20, 2000. The Bureau of Land Management interprets the list from C.F.R. §3809.555 as an exclusive list of acceptable financial guarantee instruments.

Mining Act was passed in 1993.³¹ The Act prohibits “any type or variety of self-guarantee or self-insurance”.³² The rules instead allow a “third party guarantee” which has been liberally construed to allow guarantees from related entities as long as one is not a “mere instrumentality of the other” (essentially a piercing the corporate veil standard). The rules only allow guarantees to cover up to 75% of the total financial assurance for a facility. The tests for hardrock guarantors are stricter than the SMCRA standards. The financial tests were taken from the Resource Conservation and Recovery Act (RCRA) and require net worth to be six times the total financial assurance and all other guarantees for environmental permits in the U.S. (as opposed to SMCRA requiring four times all coal guarantees).

New Mexico’s hardrock third party guarantee documents establish oversight provisions as well. For one guarantor, the state required a quarterly report together with its 10Q and a certification that it still met the financial strength test. New Mexico also had an agreement that provided for the non-guarantee portion of a company’s financial assurance to be reduced over time by applying all releases to the guarantee and using other mechanisms such as trust funds that appreciated over time.

Alternative Bonding Mechanisms (Bond Pools)

Bond pools, an alternative bonding mechanism that gained popularity in the 1990’s, are seeing considerable attention today given recent court decisions and overall experience with these bond pools. At present, about six states utilize some form of bond pool, often as a backstop or safety net for those situations where there are differences between the estimated cost of reclamation and actual costs. Several states are in the process of restructuring their bond pools and how the pool will be funded utilizing a combination of severance tax money and contributions from participants in the pool. This move has been motivated by the same concern that caused Pennsylvania to move completely away from its bond pool and to turn instead to either full cost bonding or the use of trust funds, and that is a court decision that required the entire bond pool to be liable for the full obligations of any one mining company.³³ In situations where a single company experiences unanticipated acid mine drainage requiring long-term treatment and is unable to meet this obligation, the bond pool has been required to pay for these costs, often depleting the entire pool. With the addition of the Fourth Circuit decision³⁴ that some reclamation work undertaken by a state

³¹ Sections 69-36-1 to 69-36-20 NMSA 1978 (The New Mexico Statutes Annotated (NMSA) and the New Mexico Administrative Code (NMAC) can be viewed at the New Mexico Center for Public Records website: www.nmcpr.state.nm.us)

³² 19.10.12.1203 NMAC

³³ *Pennsylvania Federation of Sportsmen’s Clubs, et al. v. Hess*, 297 F. 3d 310 (3d Cir. 2002).

³⁴ *West Virginia Highlands Conservancy, Inc. et. al v. Huffman*, Appeal No. 09-1474, Before the United States Court of Appeals For the Fourth Circuit (Decided 11/08/2010).

pursuant to a bond forfeiture may require the issuance of an NPDES permit, there is great reluctance to place much confidence in bond pools.

More specifically, statutory revisions to Ohio's coal law that were effective April 6, 2007 resulted in a dual bonding system.³⁵ Companies with less than 5 years history of mining coal in Ohio are required to post a full cost bond. Those companies that meet the 5-year criteria for mining coal in Ohio are required to elect their method of providing bond – either full cost or bond pool – with the approval of each application for a permit. Currently, of 270 active permits in Ohio, 12 are full cost. The remaining 90 percent of permits are in the bond pool, representing about 45 companies.

The Ohio alternative bonding system (or bond pool) is funded by a fluctuating severance tax on coal extracted, as well as civil penalties, money from liens and fines. The per ton tax is determined by the balance in the bond pool at the end of Ohio's biennium. Recently, the severance tax was decreased to 12 cents due to the bond pool holding in excess of \$18 million. Eligible companies electing to participate in the bond pool are required to post a \$2500 per acre bond or performance security, in addition to paying the fluctuating severance tax.

The initial statutory revisions in 2007 excluded expenditures for reclamation costs from the bond pool for those permits that had stand-alone coal preparation plants and coal waste facilities, subsidence-related damages, and any costs associated with long-term water treatment when a determination has been made by the Chief that a permittee is responsible for mine drainage. Several subsequent revisions were made to Ohio's coal mining law relative to these exclusions due to inconsistency with federal law as it pertains to DOI-OSMRE approval of an alternative bonding system. However, later statutory revisions restored the exclusions for stand-alone facilities and subsidence that were in the initial revisions to the law.

Most recently, a provision was enacted into law that the bond pool would remain responsible for long-term water treatment on permits operated by permittees meeting the 5-year eligibility criteria when an alternative financial security (AFS) was only partially funded or not funded at all. Long-term water treatment costs require that an alternative financial security be fully funded over a 5-year period by a contractual instrument or trust to ensure continued water treatment. This contract or trust remains responsible for treatment of discharges even after jurisdiction has been terminated for land reclamation costs on a permitted site and the performance bond for land reclamation has been released. If the AFS is not fully funded by the permittee within the 5-year period, or in the event of operator default, a priority lien will be filed against the permittee, and the bond pool is liable for any expenses associated with the treatment that are not recouped.

³⁵ OHIO Rev. Code Sec. 1513.08 et seq.

An Advisory Board, appointed by the Governor of Ohio, reviews deposits to and expenditures from Ohio's bond pool. The Board contracts periodically for actuarial analyses of the bond pool to evaluate the pool's solvency both short-term and long-term. The Board is required to provide a report biennially to Ohio's Governor that describes the financial status of the pool and includes recommendations for any changes or alternative methods of funding the pool that are warranted to maintain a balance which allows for timely reclamation in the event an operator defaults.

In Kentucky, the Kentucky Reclamation Guaranty Fund was established³⁶ in response to OSM's issuance of a Part 733 letter³⁷, requiring immediate and long-term actions to ensure that bond amounts were adequate.³⁸ New protocols increasing bond amounts by 60 percent were not sufficient, so planning began to create a mandatory bond pool to act as a "back stop". The mandatory reclamation account covers costs of reclamation for forfeited coal mining sites when the permit specific bond is inadequate.

After a certain date, all permittees are mandatory members of the KRGF.³⁹ The Fund initially uses assets of the former voluntary bond pool, and those who participated in the former pool get subsidized rates for permitting in the future. Going forward, the KRGF is funded by a one-time fee to new entries to the pool of \$1,500, in addition to the \$10 per "active acre" fee based on bonded acreage. Tonnage fees are assessed based on the permit's classification among five possible groups: surface coal, underground coal, combined surface and underground, non-production, and dormant.

Permittees that notify the KGRF Commission by a certain date are allowed to "opt-out" and are not subject to fees. However, those that opt-out must then obtain a full cost bond based on "worst case" conditions, per Kentucky's Full-cost Bond Calculation Manual

The Kentucky Reclamation Guaranty Fund Commission was established to oversee the Fund. Each of the seven members are appointed by the Governor: two representatives from the coal industry, two from the banking/insurance industries, one CPA, and the EEC Cabinet Secretary serving as Chairman. The Commission is responsible for monitoring the fund, establishing processing and payment structures, establishing review mechanisms, and setting a schedule for late or failed payments.

³⁶ KRS 350:500-521

³⁷ Letter from Joe G. Pizarchik to Dr. Leonard K. Peters (May 1, 2012). A copy of the OSM letter to Kentucky can be found at: <http://archives.wfpl.org/wp-content/uploads/2012/05/OSM-letter.pdf>

³⁸ The part 733 process is described at 30 CFR 733.12(b)

³⁹ See 405 KAR 10:070-090

In Nevada, a successful bond pool is limited to smaller and midsize operations. The maximum financial assurance allowed for the bond pool is three million dollars.⁴⁰ Operators with greater than \$10,000 in financial assurance pay an initial amount of roughly between 50 and 80 percent and then add amounts over the next five years to bring their contribution to one hundred percent.⁴¹ Operators with less than ten thousand dollars pay the full amount. These high contribution levels protect the solvency of the pool. Operators who often have few choices other than establishing a cash account in the full amount derive some benefit from the pool. For the small operators with less than \$10,000 in financial assurance, the pool allows them to quickly meet the financial assurance requirements for notice operations on federal land while avoiding a lengthy review of their instrument by the BLM.

Bonding “Packages”

With the financial assurance numbers increasing and the companies finding fewer mechanisms to meet their entire need, agencies and companies have looked at “packages” of financial assurance instruments. Techniques include not just a variety of instruments but also providing some funding over time and matching specific instruments to particular phases of the reclamation obligation.

By using several mechanisms, agencies and operators can more appropriately allocate risk. For larger mines or mines with known environmental risks, the financial assurance can be roughly divided between short-term (e.g./ earthwork, revegetation, demolition) and long-term (e.g., long-term monitoring and maintenance, water treatment) obligations. Agencies and operators can then match these obligations with an appropriate financial assurance mechanism. For instance, a guarantee, if available, and surety bonds are relatively low risk mechanisms in the short-term but much higher risk in the long-term, and therefore should be matched with short-term reclamation obligations. A trust fund provides opportunity for appreciation and, therefore, is better matched with long-term obligations.

As an example, the financial assurance package for New Mexico’s Tyrone Mine, which had a financial assurance requirement of over \$270,000,000, included a trust fund, a surety bond, real property collateral, a letter of credit, and a third party guarantee. In addition, the company agreed to increase funding of the trust fund over five years and to conduct accelerated reclamation over the next ten years to reduce obligation.

How this will play out remains to be seen – but the current trend appears to be toward the requirement that full cost bonds must be obtained by operators,

⁴⁰ NAC 519A.585

⁴¹ NAC 519A.595

with the underlying concern about capacity of the surety market to meet these demands.

Bonding Requirements for Permit Transfers

Complicating things further have been recent demands by large landholding companies that some form of financial assurance be left in place following bond release (and termination of jurisdiction) under SMCRA to cover those situations where post-bond release water quality issues arise downstream from the original mining operation. These concerns have come to the forefront in West Virginia. The West Virginia Department of Environmental Protection (WVDEP) maintains its ability to require increased bonds when a permit transfer is made if it feels that the new company has insufficient capital or the bond is insufficient. WVDEP bases this ability on the following rules:

“The applicant shall affirmatively demonstrate to the Secretary that a bond in the full amount of that required for the permit will be kept in full force and effect before, during, and after the transfer, assignment, or sale.”⁴²

--- and ---

“For bonds and permits which are to be transferred, assigned or sold under the provisions of subsection 3.25 of this rule and which have significant long-term environmental liabilities, the Secretary may require a showing that either the bond is sufficient to cover the liability or that the assignee has the financial resources and capability to assume the liability.”⁴³

The latter rule (11.2e) was a subject of some controversy in a recent case, wherein WVDEP approved the transfer of a permit to a new company, Rhino Eastern, but required an increase in their bond from \$133,000 to \$2.76 million.⁴⁴ Rhino Eastern asserted that these rules do not allow WVDEP to increase existing bond amounts, and that WVDEP violated the \$5,000 per acre cap on bonds based on Rhino’s view that rule 11.2e would, at the most, give WVDEP the ability to deny the transfer of the permit if Rhino would not post the increased reclamation bond amount. Further, the company asserted that if WVDEP did require an increased bond amount, that amount could not exceed the \$5,000 per acre cap.

While this case seems to call in to question WVDEP’s ability to require increased bond under rule 11.2e, there is in fact great confidence by the agency

⁴² WVCSR § 38-2-3.25.a.1

⁴³ WVCSR § 38-2-11.2e

⁴⁴ Rhino Eastern, LLC v. Clarke et. al, Appeal No. 2011-09-SMB, Before the West Virginia Surface Mine Board.

that this ability remains in tact. The rule came into effect in 1992, making it over 20 years old, and should therefore not be understood as a new development. Rather, it is a long existing and important tool for WVDEP to insure that permit transfers to undercapitalized firms do not result in bond forfeiture and bankruptcy, thereby protecting the Special Reclamation Fund against these types of liabilities. Commonly, as in the recent Rhino Eastern case, WVDEP will try to negotiate with companies acquiring permits of concern by increasing their bond amounts to a reasonable degree. This allows the company to avoid the alternative of bankruptcy court, while still serving the ultimate goal of avoiding untreated water pollution.

The Agreed Order approved by the West Virginia Surface Mine Board (Board) between Rhino Eastern and WVDEP restored the company's bond to the previous amount of \$133,000. Rhino Eastern agreed, however, that it will manage its assets such that it maintains a tangible net worth of at least \$35,000,000, and will provide 30 days notice if it plans to make any distribution of assets exceeding that threshold. Rhino Eastern must also submit an annual audited financial statement, and quarterly unaudited financial statements. The Board's decision, noting that "the legal and factual issues are fairly disputed by the parties," supported the Agreed Order arrived at by the parties in this case, but made no generally applicable ruling. The Board also stated that WVDEP can still apply the rule if Rhino engages in any subsequent transfer of the permit, or if they do not maintain the assets required by the Order.

In another recent proceeding, the Ohio Valley Environmental Coalition, Sierra Club, and the West Virginia Highlands Conservancy brought suit against Fund 8 Domestic LLC, a large corporate landholding company.⁴⁵ The environmental groups allege that two now defunct mines on the Defendant's property are polluting local waterways to illegal levels. The environmental groups argue that since the operators of the mines have been released from their obligations, the landholding companies are liable for continuing selenium discharges. Further, because the landholding company did not eliminate the discharge or receive a permit for the discharge, it is liable for a daily penalty under the CWA.

The permits and the land changed hands many times since original permitting. The Complaint goes through the history of each of the two sites respectively, chronicling the various transfers and permits of those properties since they were originally permitted. In both cases, WVDEP granted phase three bond release for the permits. All coal removal activities ceased in those permitted areas and WVDEP terminated SMCRA jurisdiction over the mine. In 2012, water samples near the toe of the valley fill tested positive for selenium "near or at

⁴⁵ *Ohio Valley Environmental Coalition, et al v. Fund 8 Domestic, LLC*, Civil Action No. 2:13-28801, in the United States District Court for the Southern District of West Virginia, Charleston Division

illegal levels.” The complaint outlines the evidence for why the selenium discharge could only be coming from the two valley fills in question. The environmental groups allege that since the defendant took no meaningful action to eliminate the discharge or to obtain a permit for the discharge, they are in violation of the CWA and are liable for civil penalties up to \$37,500 per day.

In order to avoid being the target of these CWA lawsuits, it is feared that landowners will become increasingly insistent that the water be sampled for selenium or other constituents before bonds can be released. In addition, where larger mine operators seek to sell or transfer permitted operations to raise cash, there are concerns that they may be selling to less well-capitalized operators. Both the landowners/lessors and the state regulatory authorities are concerned that these sales will increase the likelihood that there will be inadequate bonds in place to address long-term water obligations at permitted sites and, as a result, are seeking additional leverage and security in the deals. Where a mine operator/lessee needs consent of a landowner/lessor to assign a lease as part of a deal, skittish landowners are looking for ways to gain more security and keep the original lessee on the hook. One avenue to increase protection is the WVDEP’s authority under rule 11.2e, as discussed above, to require increased bond as a condition of change in ownership or control.⁴⁶ WVDEP will often try to require greater bond when a permit is transferred to a less well-capitalized company, especially where selenium liability exists. While this and other SMRCA options remain available, landholding companies are seeking additional means of increasing protection, like for example, looking to their lessees.

Other Bonding Concerns

There are a variety of other issues that the states are currently working through in the bonding arena and many of these were discussed at three recent workshops that IMCC hosted for state regulatory authorities.⁴⁷ Beyond those mentioned above, states are also focused on bond forfeitures, especially those associated with bankruptcies and the potential for alternative enforcement; tracking letters of credit as a result of bank mergers and closures; difficulties associated with updating and increasing bond amounts; the expense associated with full cost bonding; insufficient funds following bond forfeitures; and the increasing complexity of administering a bonding program, especially with regard to risk analysis.

⁴⁶ WVCSR § 38-2-11.2e

⁴⁷ Presentations at these workshops may be found under the “Meeting and Workshop Presentations” tab on IMCC’s website (www.imcc.isa.us).

Adjustments being considered by the states include:

- Increased frequency of review of existing bonds
- Increasing the amounts of individual bonds; use of reclamation guaranty
- Moving toward full cost bonding
- Making the requirements more restrictive to participate in a bond pool
- Placing restrictions on permits that are being transferred to new entities, especially where the bond pool is concerned
- Elimination of self-bonding
- Increasing the reclamation tax for alternative bonding systems (pools)

Adjustments related to bond calculation methodologies include:

- Periodic adjustment to cost factors related to the state of the economy (inflation)
- Refinements related to mob, demob, engineering, inspection
- Annual recalculations
- Adjusting calculations for pit volume to account for worst case
- Reevaluating the basis for cost estimations, i.e. use of actual true market value based on regional contractor bids as opposed to Means or BlueBook values.

Current challenges being faced by the states include:

- Costs associated with collateral and surety bonds
- Insuring that money for reclamation will be available where self-bonds are in place
- Tracking letters of credit and CDs as a result of multiple bank mergers (especially as regards the potential loss of these instruments)
- Obtaining reliable information about the financial health and viability of financial institutions and surety companies.
- Adjusting bond amounts related to incremental or phased bonding for complex mines
- Determining the amount of full cost bonds for any given mining permit.

Bond release challenges include:

- Incentivizing mine operators to seek bond release. TX experiment related to increased fees
- Tracking the revegetation period, especially in the West
- Dealing with water treatment obligations that arise after bond release
- Situations where the post-mining land use changes from what was initially permitted.

Financial Assurance Requirements under Section 108(b) of CERCLA

Before closing I would also like to touch briefly on EPA's anticipated rulemaking on financial assurance for the hardrock mining industry pursuant to Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). While this initiative generated much attention and no small amount of angst when it was first noticed in the Federal Register in July of 2009, the effort has seen its fair share of fits and starts and is currently not scheduled for formal proposal until the summer of 2015 according to EPA's most recent regulatory agenda. Given the complexities associated with the rule, this is no surprise from the states' perspective. We have engaged with EPA on a consistent basis over the past five years to ensure that the agency understands the implications of the rule for existing state financial assurance programs in the hardrock sector, including the potential for federal preemption. Hopefully some of our input has given the agency pause and will allow them to focus on the critical concerns that we have articulated along the way.

As a quick primer, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁴⁸, alternatively referred to as Superfund, has two primary purposes: "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."⁴⁹ Certain sites that are determined to be high priorities are listed on the National Priorities List, which happens to include several inactive and abandoned mine sites.⁵⁰ While EPA can seek reimbursement from potentially responsible parties⁵¹, or PRPs, for costs related to Superfund cleanups, the statute is primarily backward looking since Superfund pays for cleanups after hazardous materials are released and other sources of funds are not readily available.

Section 108(b) of CERCLA however provides for prospective financial assurance and requires EPA to identify specific segments of the regulated community that must "establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage or disposal of hazardous substances."⁵² In

⁴⁸ 42 U.S.C. § 9601, et seq

⁴⁹ Burlington Northern and Santa Fe RR Co. v. United States, U.S., 129 S. Ct. 1870, 1874, 173 L. Ed. 2d 812, 818 (2009) (internal quotations omitted).

⁵⁰ National Priorities List for Uncontrolled Hazardous Waste Sites, 62 Fed. Reg. 15,572 (Apr. 1, 1997) (codified at 40 C.F.R. Part 300).

⁵¹ 42 U.S.C. § 9607; Niagara Mohawk Power Corp. v. Chevron, U.S.A., Inc., 596 F.3d 112, 120 (2nd Cir. 2010).

⁵² 42 U.S.C. § 9608(b).

2008, in *Sierra Club v. Johnson*,⁵³ the Sierra Club and others sued to force EPA to complete its non-discretionary duty to carry out the first step in Section 108(b) by identifying the classes of facilities that would be required to provide financial assurance. While not imposing a date certain for completing a rulemaking on the matter, the U.S. District Court for the District of Columbia ordered EPA to identify the classes of facilities embraced by Section 108(b) by May 4, 2009.⁵⁴

EPA published the 108(b) Priority Notice on July 28, 2009⁵⁵ in which, as its initial foray into this new area, it identified classes of facilities within the hardrock mining industry as a priority for developing financial assurance, focusing specifically on those facilities that extract, beneficiate or process metals (e.g. copper, gold, iron, lead, magnesium, molybdenum, silver, uranium and zinc) and non-metallic, non-fuel minerals (e.g. asbestos, gypsum, phosphate rock and sulfur).⁵⁶ EPA selected these first priority classes based on language in Section 108(b) concerning the “degree and duration of risk” associated with hazardous substances for the hardrock industry and with priority given to the classes that “present the highest level of risk of injury.”⁵⁷ EPA intends to cover applicable active mining and mineral processing facilities and continues to analyze the potential universe of mining operations to determine which classes of facilities merit regulation. EPA also continues to explore the level of financial responsibility that will be required based on the level of risk and using background information gained from experience under Superfund, commercial insurers, court settlements and voluntary claim satisfaction.

In developing the rules, EPA has been seeking the advice of the commercial insurance industry. It is anticipated that financial responsibility can be established by any one, or any combination of, insurance, guarantees, surety bond, letter of credit, or qualification as a self-insurer. Decisions about exactly what forms will be satisfactory are still very much unresolved, as is the mechanism by which degree and duration of risk will be determined for purposes of setting the amount of financial assurance. As part of its data gathering process, EPA has prepared 20 reports on existing state financial assurance requirements for the hardrock mining industry. The states, through IMCC and the Western Governors Association, have had several opportunities to provide comments on these reports and on the overall approach for the anticipated rule. While we still do not have a clear idea of where EPA may be headed with the rule, the one predominant concern for the states has been the potential for preemption of state programs.

⁵³ *Sierra Club v. Johnson*, Case No. 08-01409, U. S. District Court for the Northern District of California.

⁵⁴ 128 *Sierra Club v. Johnson*, Case No. 08-01409, 2009 U.S. Dist. LEXIS 14819 (N.D. Cal. Feb. 25, 2009).

⁵⁵ 108(b) Priority Notice, 74 Fed. Reg. 37,213

⁵⁶ *Id.* at 37,214.

⁵⁷ *Id.* (quoting 42 U.S.C. § 9608(b)(1)).

Section 114(d) of CERCLA provides that “except as provided in this title, no owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this title shall be required under any state or local law, rule or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility.”⁵⁸ Pursuant to this dictate, evidence of compliance with EPA’s rules on financial responsibility must be accepted by a state in lieu of any other requirement imposed by the state in connection with this liability. Several western state attorneys general have weighed in with letters to EPA regarding the potential impacts of this preemption provision for their respective state regulatory programs for the hardrock mining industry.⁵⁹ Simply put, if a state is unable to rely on its own financial assurance regulatory provisions, the overall integrity of the state regulatory program is undermined given the critical link between permitting and enforcement requirements. This would likely play out where a state or federal court invalidates a state law based on the preemption language of CERCLA. Things become even more complicated given the interplay between state law and the interests of the federal government pursuant to land management laws like FLPMA. The states have generally coordinated well with BLM and the Forest Service to address their respective bonding requirements but the 108(b) rules could throw a substantial wrench in the works. As a result, EPA has also been spending considerable time meeting with BLM and Forest Service to work out their differences and concerns.

As you might guess, the mining industry has expressed its dismay about the potential impacts of a CERCLA 108(b) rulemaking on its current arrangements with states and other federal agencies. Industry asserts that it is already subject to extensive regulation where hardrock mining is concerned, including financial assurance requirements. Industry also believes that the potential risks associated with hazardous material releases at minesites have been overestimated. Further, industry notes that using past experience with legacy sites under Superfund to develop financial assurance requirements is misguided given the significant advances that have occurred over the years in both mining techniques and regulatory regimes. Industry is also concerned about the cost and availability of financial assurance options should amounts be set too high.

The prognosis for EPA’s rulemaking has been further clouded by a recent rider contained in the FY 2014 Omnibus Appropriations Act signed by the President on January 17, 2014. It contained language that reads as follows:

Prior to proposing any rule pursuant to section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C.

⁵⁸ 42 U.S.C. § 9614(d)

⁵⁹ Copies of the letters submitted by attorneys general from the states of Alaska, Arizona, Colorado, and New Mexico are available from IMCC.

9608(b)), the Administrator is directed to collect and analyze information from the commercial insurance and financial industries regarding the use and availability of necessary instruments (including surety bonds, letters of credit and insurance) for meeting any new financial responsibility requirements and to make that analysis available to the House and Senate Committees on Appropriations and to the general public on the Agency website 90 days prior to a proposed rulemaking. In addition, the analysis shall include the Agency's plan to avoid requiring financial assurances that are duplicative of those already required by other Federal agencies.

Obviously the U.S. Congress intends to keep a close eye on progress with regard to this far-reaching rulemaking by EPA.

Alternative Enforcement

A final point relates to alternative enforcement, which has become increasingly more important as we face the challenges associated with bond forfeitures and bankruptcies, be it coal companies or sureties themselves. Under SMCRA, there are two types of enforcement. The primary area includes notices of violation, cessation orders, assessment of civil penalties and show cause orders.⁶⁰ SMCRA also provides for alternative enforcement options⁶¹ which include civil actions for relief, individual civil penalties⁶², permit suspension or revocation for a pattern of violations, permanent permit ineligibility, criminal penalties⁶³, and enforcement on continuing violations and on abandoned sites. There are several reasons why state and federal agencies have pursued alternative enforcement, including less reliance on bonds themselves, reducing financial pressure on state special reclamation funds, encouraging abatement of violations, establishing a strong deterrent from abandoned sites, and promoting the "polluter pays" principle.

The key to the successful use of alternative enforcement lies in an appreciation of early indicators of potential failure of a company. Among these are cash flow problems, including inability to pay employees, vendors, and labs; an increase in the occurrence of violations, including failure to abate violations; delayed reclamation or production; termination of leases; departure of key people in the organizational structure; the sale of permits or other assets, including where equipment is being removed from a site; and of course the initiation of bankruptcy proceedings. As regulatory authorities, there are several key action items that we must consider:

- Taking action to minimize exposure and reduce risk when these warning signs appear

⁶⁰ SMCRA §521

⁶¹ 30 CFR 845.15(b)(2)

⁶² 30 CFR 846 ; SMCRA § 518(f)

⁶³ 30 CFR 847.11; SMCRA §518(e) and (g)

- Keeping in constant communication with the company, including not only company officials, but other regulatory agencies, vendors, mineral owners and sureties.
- Taking action to limit new or additional disturbance until the situation is resolved
- Focusing on the minimization of danger to the public and off-site impacts, especially where water quality or stability issues are concerned

Three past examples of where alternative enforcement was employed successfully include Lodestar Energy, Horizon and Unity Virginia. What we learned from these events is that cooperation among state and federal agencies is key, especially where a multi-state problem is concerned. Communication among all the players can be worth the time and effort that is involved. It is useful to be creative in exploring new approaches and incentives to achieving reclamation. And perseverance, including in bankruptcy proceedings, is important. With the proper approach, environmental violations that create danger to the public can often place state regulators in front of other creditors, especially if the state has positioned itself well early on in the process.

Conclusion

Reclamation bonding has been a perennial issue with regard to the regulation of mining operations nationwide and will obviously continue to provide a plethora of challenges going forward. For their part, the states who exercise primary (and often exclusive) authority for regulating in this area continue to pay close attention to the ever-changing dynamic that attends this critical aspect of their regulatory programs. What a state regulator MUST do is attempt to stay one step ahead of the economic, financial and corporate health factors that will define the landscape for the future.

Thanks for your attention today. I would be happy to answer any questions or provide you with additional contacts or information.