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EPA Updates Its Audit Policy with "eDisclosure"

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*By: **Timothy A. Wilkins** and **Jason B. Hutt***

On June 10, 2015, the U.S. Environmental Protection Agency hosted a webinar describing a plan to modernize the implementation of its April 11, 2000 Audit Policy. The plan – called eDisclosure – attempts to provide a streamlined, web-based approach for making environmental compliance audit disclosures to EPA in exchange for penalty relief.

Background on EPA's Audit Policy.
By way of background, the Audit Policy provides an opportunity for the regulated community to conduct voluntary compliance audits, disclose individual audit findings to EPA, and complete all necessary corrective actions and, in exchange, to receive significant relief from penalties associated with the disclosed violations. The Audit Policy has been widely viewed by the regulated community as an important incentive for companies to conduct searching compliance audits and to improve their environmental performance.

Recent Developments.
In recent years, top officials have expressed some concern about the effectiveness of the Audit Policy and even suggested that resources in the agency's regional office not be spent processing audit disclosures. The regulated community and environmental attorneys active with the Audit Policy pushed back, advocating for the continuation of what they view as a very valuable tool.

Late last year, Cynthia Giles, the head of EPA's Office of Enforcement and Compliance Assurance, announced that the agency would be updating the Audit Policy to make it more efficient and take advantage of modern technology. Notably, EPA for several years invited electronic disclosures for Emergency Planning and Community Right-to-Know Act violations. It is clear that EPA is now attempting to expand that effort across the full array of statutes it enforces and to apply lessons learned from that pilot program as it rolls out "eDisclosure," a web-based system for companies to disclose audit findings and for EPA to process those disclosures.

EPA's June 10th Presentation.
On June 10th, National Audit Policy Coordinator Philip Milton and Gary Jonesi in the Office of Civil Enforcement presented a nearly two-hour webinar on the eDisclosure system and how it will modify disclosure under the Audit Policy going forward. Importantly, the webinar clarified that **so-called "New Owner Audits" can continue to be managed in the traditional fashion** outside the eDisclosure system (although new owners not requiring any of the special Audit Policy benefits available to new owners are welcome to make audit disclosures electronically through

the new system).

Starting this fall, EPA plans to launch a unified national web-based portal for audit disclosures that will be the mechanism for Audit Policy disclosures for all persons other than new owners going forward. Commensurate with that launch, EPA will publish a Federal Register notice announcing the same. EPA does not envision substantive changes to the Audit Policy as a result of this new disclosure mechanism.

The eDisclosure process will involve registering electronically through EPA's existing Central Data Exchange (CDX), submitting a Violation Disclosure Report by completing a yet-to-be-designed electronic form via the eDisclosure portal within 21 days of discovering a violation, completing all required corrective actions within 60 days of discovering a violation, and electronically certifying such completion within 60 days of making the electronic disclosure. EPA cautions the regulated community not to submit any confidential business information via the eDisclosure system as that system will not be designed to manage CBI.

As part of the eDisclosure process, violations will be lumped into two categories – **Tier 1 violations**, a narrow category covering most EPCRA violations (EPCRA Tier 2 reporting, Toxics Release Inventory, etc.) that do not involve release reporting, and **Tier 2 violations**, which include all other types of violations.[1] **Tier 1 disclosures will reportedly be spot checked by EPA staff but generally speaking will receive (promptly after corrective action has been completed and certified and without significant scrutiny by EPA) an electronic "notice of determination" – an eNOD – that grants penalty relief and resolves the disclosed violation**. As with traditional Audit Policy NODs, the risk of abuse of this lightly-scrutinized process is mitigated by the fact that penalty relief is predicated on the accuracy of the disclosures and certifications in question and can be reversed if doubts are raised.

Tier 2 violations will be screened for significant concerns but in general will receive little formal attention unless and until such time as EPA decides that the disclosed violations merit enforcement. At that time, EPA will perform a close review to determine if the disclosed violations are eligible for penalty mitigation or require an assessment to offset economic benefit. Companies disclosing Tier 2 violations will receive an acknowledgment letter to that effect from EPA. What companies will **not** routinely receive with respect to Tier 2 disclosures is an affirmative determination by EPA that those disclosures have been resolved and that they qualify for penalty relief under the Audit Policy. **Nonetheless, in the event of enforcement consideration by EPA, it would seem valuable to have made a qualifying audit disclosure as to the violations at issue and, frankly, regular users of EPA's Audit Policy will likely recognize that it is already fairly common for EPA to not issue such affirmative determinations**.

Notably, on extensions of time to correct, for Tier 2 violations, one can request up to an additional 30 days beyond the 60 days from the date of discovery via the eDisclosure system and that extension will automatically be granted and deemed granted immediately upon request. Requests for extension until 180 days after discovery also may be made via the eDisclosure system but those requests must be accompanied by a justification, are not automatically granted, and will not be deemed granted or denied until such time as EPA determines that enforcement may be appropriate and performs the close review described above. If you need time for corrective action beyond that 180 days (not atypical where corrective action requires a capital project or issuance of a new permit), EPA will consider that during the enforcement review on a case-by-case basis but under the Audit Policy corrective

actions claimed to require more than 180 days appear likely to be subject to some skepticism. As Tier 1 violations are deemed to be straightforward to resolve, they are ineligible for any corrective action extension beyond the initial 60 days from discovery.

Pros and Cons.

To the extent that the eDisclosure system allows both companies and EPA to more efficiently manage audit disclosures and reduce transactions costs associated with use of the Audit Policy, EPA's plan appears to be a win-win opportunity. EPA will hopefully see this change as creating more "bang for the buck": even if the "bang" doesn't change, processing disclosures submitted through eDisclosure will hopefully cost fewer "bucks."[2] And if that helps the Audit Policy survive, that will be a valuable outcome.

One potential concern with the new program arises from our experience with audit disclosures generally, with EPA's preferred questionnaire-driven approach to audit disclosure, and with the EPCRA eDisclosure pilot program. Specifically, sometimes-complicated factual or legal circumstances may be difficult to appropriately capture in a questionnaire-driven format or a web-based dialog box. We are optimistic, however, that EPA will continue to be open to appropriate sidebar communications about **square peg issues that may not fully fit in eDisclosure's round holes** going forward and that EPA will provide some guidance on the best mechanism for addressing such circumstances. As EPA has not yet completed the template or interface for these electronic disclosures, however, the degree to which this issue is a concern is unclear.

Another concern is that **EPA proposes to only screen but not affirmatively act on audit disclosures of the non-EPCRA violations unless and until such violations are considered for enforcement**. While this will certainly minimize EPA's processing time and program costs, the person making the disclosure **remains somewhat in limbo at least until such time as (a) the statute of limitations passes or (b) EPA determines both that enforcement is appropriate and that Audit Policy penalty relief is not**. EPA may be able to allay such fears by providing greater clarity about what its silence means, how long it is likely to last, and what their enforcement consideration process is as part of the "acknowledgment letter" it proposes to send to all persons making Tier 2 disclosures. As noted above, it is not uncommon today that persons making traditional audit disclosures fashion often do not hear back from EPA for years, if at all, so this seems only to formalize the existing process rather than to reflect a significant practical change.

Finally, the agency has traditionally deemed materials relating to audit disclosures that have been finally resolved to be subject to production under the Freedom of Information Act but resisted releasing unresolved disclosures pursuant to FOIA's exception for enforcement actions. EPA made clear during the webinar that the latter approach is likely to change with the advent of eDisclosure and that, in the interest of transparency, **unresolved disclosures will likely be deemed releasable under FOIA going forward unless there is specific, FOIA-cognizable harm identified on a case-by-case basis**. For some in the regulated community this change may reduce the perceived benefits of the Audit Policy and negatively impact their incentive to audit.

Should you wish to discuss the current state of EPA's Audit Policy, the new eDisclosure system, or the various state audit disclosure laws and policies that are available around the country, please contact us.

[1] I have already commented to EPA that calling these "Tier 1" and "Tier 2" violations is confusing since an EPCRA Tier 2 chemical inventory violation would be an eDisclosure "Tier 1" violation and since eDisclosure Tier 2 violations include pretty much everything but EPCRA Tier 2 requirements. Perhaps "Group 1" and "Group 2"?

[2] On the subject of "bang for the buck," in our view EPA has failed to take an important opportunity while updating its Audit Policy to further improve on the policy's social benefits. EPA continues to treat air-related disclosures at major sources of air pollution as ineligible for penalty relief since major sources are already required to annually certify compliance after due inquiry and, therefore, compliance audits covering air issues aren't "voluntary." Restoring eligibility for major sources certainly could have dramatically increased the Audit Policy's environmental "bang."