

CLIENT ALERT

EPA Unveils Significant Changes to Its Audit Policy Procedures

June 19, 2015

On June 10 and June 15, the U.S. Environmental Protection Agency (EPA) hosted webinars to unveil its *eDisclosure* portal designed to modernize and streamline the implementation of its Audit Policy and Small Business Compliance Policy (collectively, "Audit Policies"). The *eDisclosure* portal provides a centralized, web-based platform for regulated entities to voluntarily disclose violations under the Audit Policies. By automating certain aspects of the audit process—like requests for extensions and even the resolution of disclosures—the portal is intended to reduce the paperwork and labor for resolving the disclosures, and make the process more efficient. EPA plans to launch the portal in Fall 2015. After launch, all voluntary disclosures under the Audit Policies (except those falling under the August 2008 New Owner Policy) must be submitted through the *eDisclosure* portal.

EPA's Audit Policies, which were first introduced in 1995 and 1996, offer penalty mitigation and other incentives for entities that voluntarily disclose violations of environmental laws and regulations. Under the Policies, disclosing entities that satisfy nine criteria are entitled to receive 100 percent mitigation of the gravity-based penalties for those violations (75 percent mitigation if only eight of the criteria are met) and, in most instances, a recommendation against criminal prosecution. The Small Business Compliance Policy provides similar incentives to the general Audit Policy, but tailors the reporting conditions to the capacity and special needs of small businesses. The purpose of the Policies is to encourage self-policing and regulatory compliance.

The *eDisclosure* portal does not change the Audit Policies' purposes, incentives, or qualifying criteria. Rather, it streamlines the reporting and resolution of self-disclosed violations through the online submission of disclosures and certified correction and compliance reports. Depending on the type of violation and whether all Audit Policy conditions are met, violations are reported as a "Tier 1" or "Tier 2" disclosure:

- Entities making Tier 1 disclosures will automatically receive an electronic Notice of Determination (eNOD). An eNOD resolves the reported violation with no civil penalties, but is conditioned on the accuracy of the entity's certified report that the violation has been corrected and the Audit Policies' conditions have been met. Tier 1 disclosures are limited to certain straightforward EPCRA violations where the reporting entity met all nine conditions of the Audit Policies.
- Entities making Tier 2 disclosures receive an Acknowledgement Letter in which EPA promises to determine penalty mitigation "if and when it considers taking enforcement action for environmental violations." Thus, an Acknowledgement Letter does not immediately confirm penalty mitigation eligibility. Tier 2 disclosures include all disclosures that are not Tier 1 disclosures.

As long as entities meet their reporting deadlines, the *eDisclosure* portal will issue eNODs and Acknowledgement Letters automatically. Extensions to deadlines for correcting violations and submitting compliance reports are available for Tier 2 disclosures but not Tier 1 disclosures. EPA plans to spot check and screen disclosures and compliance reports for errors, inconsistencies and other issues of concern.

Once EPA launches the *eDisclosure* portal, it will be the only platform for submitting and processing voluntary disclosures under the Audit Policies, except those falling under the 2008 New Owner Policy. New owners of recently acquired facilities may, but are not required to, report disclosures through the *eDisclosure* portal. Also, EPA will no longer enter into audit agreements providing special, separate compliance procedures except in the new owner context.

In accordance with the Administration's policy in favor of transparency, EPA expects to make both Tier 1 and Tier 2 disclosures available in response to FOIA requests within a relatively short time after the disclosure but before the disclosure is resolved. EPA will make a case-by-case determination of whether releasing any specific disclosure would harm an interest protected by a FOIA exemption. Confidential business information (CBI) will, however, continue to be protected. Indeed, the *eDisclosure* portal will not be designed to receive or process CBI. All portal submissions should be free of CBI, and CBI must be separately submitted under existing EPA regulations.

EPA's planned launch of the *eDisclosure* portal in Fall 2015 will include a Federal Register notice describing the implementation of the Audit Policies. Although the Agency does not intend to open a formal comment period, companies should consider providing input now, while EPA is still in the process of developing the *eDisclosure* portal.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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