



## EPA Launches Online eDisclosure Portal

On December 9, 2015, the U.S. Environmental Protection Agency (“EPA”) unveiled<sup>1</sup> a new, web-based “eDisclosure” system that allows regulated entities to submit self-disclosures regarding violations uncovered in circumstances meeting the requirements of the Audit Policy<sup>2</sup> and Small Business Compliance Policy.<sup>3</sup> Under those policies, entities that voluntarily disclose and correct violations may be entitled to mitigation of civil penalties as well as other incentives under certain circumstances. Both policies have been in place since 2000, but EPA has sometimes experienced delays in processing and responding to disclosures. The new eDisclosure system is intended to centralize, streamline, and automate the disclosure process without making any substantive change to existing EPA policy. To use eDisclosure effectively, regulated entities will need to understand the requirements of the new system, its potential benefits and limitations, and EPA’s existing policy requirements.

### No Change to EPA Policy

Under the Audit Policy, regulated entities can receive significant relief from so-called “gravity-based” penalties if they self-disclose violations to EPA. The Audit Policy allows a reduction of up to 100 percent of the gravity-based portion of civil penalties if an entity

meets all nine conditions of the policy, including systematic discovery, voluntary discovery, prompt disclosure, and timely corrective action.<sup>4</sup> Disclosing entities are eligible for a 75 percent reduction of gravity-based penalties under the Audit Policy if they do not discover the violation through a systematic process but meet the other eight policy conditions. The Small Business Compliance Policy allows similar incentives for entities with 100 or fewer employees, but the eligibility criteria for small businesses are more flexible. Neither policy affects EPA’s decision to recover civil penalties for any economic benefit conveyed by a violation.

According to EPA, about half of the disclosures submitted under the Audit Policy have been for violations of the Emergency Planning and Community Right-to-Know Act (“EPCRA”).<sup>5</sup> In fact, EPA previously administered an eDisclosure Pilot Program for EPCRA violations at the national level. Facilities in EPA Region 6 were able to use the pilot program to disclose violations of any federally enforceable environmental requirement, but facilities in other EPA regions were limited to manual disclosures of non-EPCRA violations. EPA discontinued the pilot program in 2013, around the same time that it reduced investment in the administration of the Audit Policy. In a National Program Managers Guidance document for fiscal

year 2013, EPA explained that it was reducing investment in the Audit Policy because the violations reported were “not in the highest priority enforcement areas for protecting human health and the environment.”<sup>6</sup> EPA also indicated in 2013 that it was considering several options to modify the Audit Policy program, including options to make the program “self-implementing.”<sup>7</sup>

The eDisclosure system announced on December 9, 2015 is the result of EPA’s years-long review of the Audit Policy program and a public outreach campaign to interested stakeholders in June 2015. Because the new system makes no substantive change to the Audit Policy, regulated entities still need to satisfy the same nine criteria that were already required to take advantage of penalty mitigation and other self-disclosure incentives. There are, however, new categories of eligible disclosures and new procedures for submitting disclosures that need to be carefully understood.

## New eDisclosure Categories

The new system will accept two categories of disclosures. Category 1 disclosures are limited to: (i) EPCRA violations that meet all Audit Policy conditions and (ii) EPCRA violations that meet all Small Business Compliance Policy conditions. Category 1 excludes: (i) chemical release reporting violations under EPCRA 304 and Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) 103 and (ii) EPCRA violations with significant economic benefit as defined by EPA. For Category 1 disclosures, eDisclosure will automatically issue an electronic Notice of Determination (“eNOD”) confirming that the violations are resolved with no assessment of civil penalties, conditioned on the accuracy and completeness of the certified disclosure. EPA will spot-check Category 1 disclosures to ensure that they meet Audit Policy or Small Business Compliance Policy standards.

Category 2 disclosures include: (i) all non-EPCRA violations; (ii) EPCRA violations where the discloser can certify only compliance with Audit Policy Conditions 2–9 (i.e., the discovery was not systematic); and (iii) the EPCRA/CERCLA violations excluded from Category 1. For Category 2 disclosures, eDisclosure will automatically issue an electronic Acknowledgement Letter confirming EPA’s receipt of the disclosure, but EPA will not determine if the submission qualifies

for penalty mitigation until it decides whether to pursue an enforcement action. EPA will screen Category 2 disclosures for significant problems, including criminal conduct or imminent hazards that could result from a violation.

## New eDisclosure Process

Anyone who registers with EPA’s Central Data Exchange (“CDX”) system can disclose violations through eDisclosure, including consultants, attorneys, or other agents who are disclosing on behalf of a client or other third party.<sup>8</sup> Users must report violations via the eDisclosure system within 21 days of discovery, in accordance with the preexisting Audit Policy. Within 60 days of submitting an Audit Policy disclosure or within 90 days of submitting a Small Business Compliance Policy disclosure, the user must submit a “Compliance Certification” to the eDisclosure system. This certification must identify the specific violation being disclosed, certify that the violation has been corrected, and certify that the Audit Policy or Small Business Compliance Policy requirements have been met.

## Corrective Action Extensions

Prior to the eDisclosure launch, EPA worked with regulated entities to resolve requests to extend the deadline for correcting violations on a case-by-case basis. With the eDisclosure system, EPA is now automating the process for handling these requests by creating procedures for corrective action extensions dependent upon the disclosure category:

- **Category 1 Disclosures:** EPA will not issue corrective action extensions for Category 1 disclosures. If a user requests an extension for a Category 1 disclosure, the disclosure will potentially be eligible only for Category 2 treatment.
- **Category 2 Audit Policy Disclosures:** Users can make an online request for a 30-day extension of the corrective action deadline for Category 2 disclosures without any explanation. The extension will be granted automatically by the eDisclosure system at the time of request. Users can make an online request for an additional extension, provided that the date does not extend beyond 180 days after the date of discovery. If a user is making this additional request, it must include a justification for the extension.

- **Category 2 Small Business Compliance Policy**  
**Disclosures:** Users can make an online request for a 90-day extension under the Small Business Compliance Policy without any explanation. The extension will be granted automatically by the eDisclosure system at the time of request. Users can make an online request for an additional extension, provided that the date does not extend beyond 360 days after discovery. If a user is making this additional request, it must include a justification for the extension.

## New Owner Policy and Criminal Violations Excluded

EPA is not changing its approach to resolving New Owner Policy<sup>9</sup> disclosures or potential criminal violations disclosed to the Voluntary Disclosure Board. Under the New Owner Policy, owners of newly acquired facilities can benefit from penalty mitigation beyond what the Audit Policy offers if they disclose violations (or enter into an audit agreement with EPA) within nine months of becoming a new owner and also meet other requirements of the New Owner Policy. Effective December 9, 2015, new owners may elect to use eDisclosure for violations at their new facilities, but doing so will not provide the expanded privileges of the New Owner Policy. Instead, eDisclosure submissions by new owners will be processed in accordance with the Audit Policy. EPA will, however, continue to accept and manually process violations under the New Owner Policy outside the eDisclosure system. Disclosures of potential criminal violations should continue to be made to the Voluntary Disclosure Board and not through eDisclosure.

## Treatment of Preexisting Disclosures

Effective December 9, 2015, EPA will accept voluntary disclosures under the Audit Policy and the Small Business Compliance Policy *only* through the eDisclosure system. All preexisting and unresolved disclosures under those policies will be processed depending on the type of violation disclosed. Regulated entities with preexisting EPCRA disclosures that have not yet been resolved may resubmit through eDisclosure by April 8, 2017. If the preexisting EPCRA disclosure qualifies as a Category 1 disclosure, then

the entity will automatically be issued an eNOD, provided that for the resubmitted disclosure, the entity certifies within 30 days of resubmission that the violation has been corrected within the 60 days allowed by the Audit Policy or the 90 days allowed by the Small Business Compliance Policy, as applicable.

All other preexisting, unresolved disclosures under the Audit Policy or Small Business Compliance Policy that are not subject to an audit agreement or significant settlement negotiations are now classified as Category 2. Included as Category 2 disclosures are all non-EPCRA disclosures and all preexisting EPCRA disclosures that are not resubmitted by April 8, 2017. The Federal Register notice for the eDisclosure launch serves as the Acknowledgment Letter for all of these disclosures.

## Confidentiality Concerns

When disclosing violations through eDisclosure, regulated entities should be sure to remove any confidential business information (“CBI”) from their electronic submissions. Because the new eDisclosure system is not designed to protect CBI, submission of CBI through eDisclosure could potentially waive the right to CBI protection. Instead of using eDisclosure, CBI related to self-disclosures should be submitted manually through EPA’s existing procedures for handling CBI.<sup>10</sup>

Removing CBI from eDisclosure submissions is especially important because EPA is changing its policy concerning Freedom of Information Act (“FOIA”) requests pertaining to Audit Policy disclosures. Although EPA’s policy has always been to release information about resolved disclosures, the Agency has generally withheld information about *unresolved* disclosures under a FOIA exemption for law enforcement purposes.<sup>11</sup> Effective December 9, 2015, EPA has eliminated the presumption against release of information of unresolved disclosures and replaced it with a presumption in favor of providing such information. EPA says that it will determine, on a case-by-case basis, whether releasing information about unresolved disclosures would harm an interest that is protected by a FOIA exemption. However, EPA “generally expects to make ... disclosures publicly available within a relatively short period of time after their receipt.”<sup>12</sup>

## Considerations for Use of eDisclosure

EPA's development of a new, centralized eDisclosure system signals a renewed interest in encouraging continued use of the Audit Policy and Small Business Compliance Policy. The new system is likely to save time and resources for certain types of violations, but regulated entities should consider the following limitations of the new system when deciding whether and how to disclose violations to EPA in the future.

**No Clarification of Substantive Criteria.** EPA has provided no more certainty about what is required for a particular violation to meet the substantive criteria of the Audit Policy or Small Business Compliance Policy. Determining whether an entity meets these criteria (and whether a disclosure is beneficial) can be difficult and usually requires a subjective assessment of the circumstances. As in the past, routine EPCRA violations are likely to make up the bulk of eDisclosures going forward, even though the system can accept violations under any federally enforceable environmental program.

**Category 2 Uncertainty.** The new eDisclosure system may actually create less certainty for certain violations. While Category 1 disclosures will automatically receive confirmation that no penalties will be assessed, users submitting Category 2 disclosures will receive no resolution from EPA unless EPA decides to bring an enforcement action at a later time.

**Significant Economic Benefit.** Distinguishing between Category 1 and Category 2 disclosures of EPCRA violations under the eDisclosure system requires a subjective assessment of what qualifies as "significant economic benefit" in

EPA's view. Although EPA has not provided specific details regarding how it will measure or evaluate the significance of economic benefits, EPA will likely look to see if the entity received a competitive advantage from violating the regulation or if it was attempting to avoid or delay compliance costs.

**Corrective Action Deadlines.** Even with discretionary extensions, the maximum amount of time available for corrective action under eDisclosure is 60 days for Category 1 disclosures and 180 days for Category 2 disclosures under the Audit Policy. There is no mechanism in eDisclosure for an extension beyond these time periods in extenuating circumstances, such as where corrective action requires a complicated technical assessment, capital expenditure, or state or federal permitting.

**New Owner Considerations.** New owners now have a choice between disclosing violations at newly acquired facilities under the Audit Policy using eDisclosure or under the New Owner Policy outside of eDisclosure. In many cases, the best choice will depend on whether the disclosure qualifies for the Audit Policy's relatively more stringent criteria and the type of violation in question.

**Confidentiality and Public Disclosure.** Although eDisclosure is not a publicly searchable website, EPA's policy switch with respect to FOIA requests for unresolved disclosures creates new concerns for Audit Policy disclosures. Regulated entities should gauge the potential for citizen suits when deciding whether and how to use eDisclosure, especially for violations that qualify as Category 2. Entities also should carefully review their disclosures and remove any CBI before submitting to eDisclosure.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

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## Endnotes

- 1 Notice of eDisclosure Portal Launch: Modernizing Implementation of EPA's Self-Policing Incentive Policies, 80 Fed. Reg. 76,476 (Dec. 9, 2015).
- 2 Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (April 11, 2000).
- 3 Small Business Compliance Policy, 65 Fed. Reg. 19,630 (April 11, 2000).
- 4 The other five Audit Policy conditions are: (1) independent discovery and disclosure; (2) steps to prevent recurrence of the violation, (3) cooperation by the disclosing entity, (4) the violation must not qualify as a repeat violation, and (5) the violation must not be one that could result in serious actual harm, that could present an imminent and substantial endangerment, or that would violate the specific terms of an administrative or judicial order or consent agreement.
- 5 80 Fed. Reg. at 76,477.
- 6 FY 2013, EPA Office of Enforcement and Compliance Assurance (OECA), National Program Manager (NPM) Guidance, at 15 (April 30, 2012).
- 7 *Id.*
- 8 EPA eDisclosure Information Sheet at 2 (Dec. 2015).
- 9 Interim Approach to Applying the Audit Policy to New Owners, 73 Fed. Reg. 44,991 (Aug. 1, 2008).
- 10 See 40 C.F.R. Part 2.
- 11 “Confidentiality of Information Received Under Agency's Self-Disclosure Policy,” Steven A. Harmon, Asst. Admin. for Enforcement and Compliance Assurance (1997).
- 12 80 Fed. Reg. at 76,480.