

Client Alert

December 2015

EPA Unveils New eDisclosure System for the Reporting of Environmental Violations

On December 9, 2015, the US Environmental Protection Agency (EPA) announced the launch of a modernized process for self-reporting civil environmental violations through an [“eDisclosure” portal](#). Regulated entities must, in most cases, use the eDisclosure system to receive the potentially-substantial benefits of self-reporting environmental non-compliance. Before doing so, however, regulated entities should carefully review the new process and assess the recent changes in order to optimize the benefits of self-reporting while managing and minimizing the risks associated with the EPA’s public release of disclosures.

EPA’s existing [Audit Policy](#) provides substantial incentives for self-reporting civil environmental non-compliance, including significant penalty mitigation and a reduced risk of referral for criminal prosecution for those entities that meet the required conditions. Although the eDisclosure system will not change the Audit Policy in terms of the benefits and incentives that are granted for self-reporting, it does change how disclosures are made and processed, and whether they will be released to the public.

Since adopting the Audit Policy in 2000, EPA reports that the large number of self-reported violations have “taxed the Agency’s ability to promptly resolve all pending disclosures.” The new eDisclosure system, which serves as a centralized reporting portal for EPA, is intended to facilitate disclosures by the regulated community and streamline EPA’s process for resolving any enforcement action.

EPA requires use of the eDisclosure system to receive the benefits provided by the Audit Policy and its Small Business Compliance Policy. The new system, however, is not designed to receive new owner self-disclosures provided pursuant to EPA’s New Owner Policy, or criminal violations that would otherwise be disclosed to EPA’s Voluntary Disclosure Board.

The eDisclosure process requires that violations be reported via EPA’s centralized online system within the 21-day discovery period mandated by the Audit Policy. Any disclosure, and EPA’s response, will fall into one of two categories:

- *Category 1.* Most violations of the Emergency Planning and Community Right-to-Know Act (EPCRA), provided that they were identified via a systematic audit and meet all other Audit Policy conditions. Upon submitting a report through EPA’s eDisclosure portal, the system will automatically issue an electronic ‘Notice of Determination’ confirming that the violations are resolved with no assessment of civil penalties, pending the accuracy and completeness of the disclosure. EPA will only “spot check” the accuracy of these disclosures. EPA will allow companies with pending, unresolved EPCRA self-disclosures submitted to EPA prior to December 9, 2015, to resubmit the self-disclosure via the eDisclosure system within 120 days.
- *Category 2.* All other disclosures made pursuant to the Audit Policy or the Small Business Compliance Policy. The system will automatically issue an acknowledgement letter stating that EPA will make a determination as to eligibility for penalty mitigation if it pursues an enforcement action. Any entity submitting a disclosure must – within 60 days for Audit Policy disclosures or 90

days for Small Business Compliancy Policy disclosures – submit a compliance certification showing that the violations have been corrected. Under certain circumstances EPA will consider limited extensions to the compliance certification deadline. However, if an entity fails to submit a timely on-line compliance certification, EPA will consider the self-disclosure withdrawn.

The increased standardization of the eDisclosure system may lead EPA to restrict its own discretion in cases where equitable exceptions are warranted, possibly to the detriment of disclosing entities. The eDisclosure process may thereby reduce the benefits of self-disclosure for violations requiring complex or lengthy measures to achieve compliance. The centralization of self-disclosures in EPA headquarters--away from EPA Regional offices--may also make it more difficult to enter into advance discussions with EPA staff about compliance efforts and deadlines prior to an enforcement action.

In a significant change of policy that may increase the risk of self-disclosure, EPA will now make most disclosures submitted to the eDisclosure system publically available. Under prior EPA policy, unresolved self-disclosures were exempt from public release pursuant to the Freedom of Information Act (FOIA) “law enforcement proceeding” exemption.

EPA has changed course, announcing that the eDisclosure system will have a “presumption in favor of disclosure.” Although EPA will review any FOIA request for individual disclosures on a case-by-case basis, it “generally expects to make ... disclosures publicly available within a relatively short period of time after their receipt.” This substantially increases the risk of negative press and political attention for companies that file self-disclosures, and may also expose those companies to citizen suits under a number of environmental statutes.

Hunton & Williams’ offers a deep bench of legal professionals focused on working with EPA, and our lawyers can help companies navigate EPA’s new eDisclosure process. Our regulatory and environmental practice teams includes former US Department of Justice and EPA enforcement lawyers who understand how to navigate EPA’s regulatory and enforcement programs. Our lawyers partner with our clients on corporate strategy in environmental affairs, from preventative, cost saving strategy to risk and crisis management and defense. Our team will alert you to risks, and help you make decisions as you navigate complex regulatory requirements. We also ensure that you maintain environmental compliance, and avoid costly exposure to government investigations and enforcement actions. In doing so, our lawyers provide experience that allows our clients to focus on their core business and continue uninterrupted operations.

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