On June 30, 2022, the U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG) issued a report titled “Additional Internal Controls Would Improve the EPA’s System for Electronic Disclosure of Environmental Violations.” The OIG evaluated EPA’s process for screening self-reporting violations disclosed to EPA under its Audit Policy, a longstanding program that provides administrative and civil penalty relief if its terms for voluntary and timely self-disclosure and correction are met. The OIG made several recommendations for EPA to increase its review of self-disclosures to address a concern that some self-disclosures seemed to not meet some Audit Policy eligibility criteria. All of the OIG recommendations were accepted by EPA’s Office of Enforcement and Compliance Assurance (OECA), which manages...
the Audit Policy.

**Key Takeaways**

- The OIG found that EPA does not have a consistent process for reviewing and screening self-disclosures submitted through the electronic disclosure system.
- The recommendations center on increasing the effectiveness of EPA review for significant concerns that may disqualify a disclosure from penalty mitigation, such as potential imminent hazards, ongoing threatened or actual discharge or release, considerable potential for harm such as the continued sale of an unregistered pesticide or improper waste storage, and potentially criminal actions, all of which are generally ineligible for Audit Policy benefits.
- OECA has agreed to issue guidance by October 2023 and training to regional offices by September 2022, which is expected to require regions to take a closer look at all “Category 2” disclosures (primarily but not exclusively non-EPCRA disclosures).

**Background**

Self-disclosure of violations discovered through a voluntary audit or other systematic evaluation process is an important and useful tool that can protect facilities from substantial penalties. EPA estimates that between 1995-2020, over 10,000 regulated entities voluntarily self-disclosed at nearly 28,000 facilities. To qualify for full penalty mitigation, self-disclosure requires compliance with the nine following eligibility criteria listed in **EPA’s Audit Policy**:

1. Systematic discovery (often through an audit or implementation of an environmental management system)
2. Voluntary discovery
3. Prompt disclosure within 21 days of discovery or otherwise as required by law
4. Independent discovery and disclosure
5. Corrective action within 60 calendar day unless an extension is approved
6. Prevention of recurrence of the violation
7. No repeat violations
8. Violation must not be in an excluded category (examples of ineligible violations include certain Clean Air Act operating permit violations, those that result in serious harm or present an imminent and substantial endangerment, and violations of an order or settlement agreement)
9. Cooperation with EPA

Failure to comply with the systematic discovery element can still result in partial (up to 75%) penalty mitigation.
Self-disclosures are classified into two categories. Category 1 includes Emergency Planning and Community Right to Know Act (EPCRA) disclosures that meet all the Audit Policy conditions. All other disclosures fall into Category 2. Timely disclosure and correction of violations are through a self-implementing electronic platform known as eDisclosure. EPA is expected spot-check Category 1 disclosures and screen Category 2 disclosures for significant concerns that could make a disclosure ineligible or partially ineligible for Audit Policy penalty forgiveness benefits. In a FAQ issued by EPA in February 2021, the Agency acknowledged that EPA denied penalty mitigation based on “serious actual harm” or “imminent and substantial endangerment” in only a small percentage of cases. While acknowledging that significant concerns are rare, the OIG found some examples indicating more thorough screening was needed. The report highlights one instance involving a hazardous release that resulted in an evacuation of the surrounding community, which would likely make this disclosure ineligible for penalty mitigation. In its new report, OIG found that the regional enforcement programs were in how they screened Category 2 disclosures for these kinds of significant concerns.

Report Recommendations

The OIG recommended four actions, most of which OECA has agreed to implement no later than the end of September 2023. Training of EPA Audit Policy screeners will be implemented by September 2022.

- Develop national guidance that includes a process for screening eDisclosure submissions for significant concerns;
- Provide training to clarify expectations, establish responsibilities, and communicate best practices;
- Develop performance measures and a monitoring plan to track the effectiveness of the eDisclosure system; and
- Assess system functionality to identify and implement improvements.

What Does This Mean for the Regulated Community?

The Audit Policy has been a popular and effective means for companies to monitor and correct their own compliance with EPA regulations. Penalty mitigation in eligible cases remains a strong incentive to continue to use the eDisclosure system. Facilities that have discovered or are concerned about the risk of actual or potential violations should always carefully evaluate the eligibility factors under the Audit Policy to determine whether using it may be the best course of action in any particular case.

Entities that self-disclose Category 2 violations should expect that EPA will begin scrutinizing these disclosures more carefully. Based on the OIG report, increased scrutiny to avoid Audit Policy coverage for ineligible violations would benefit from more structured guidance and training in the EPA regions. EPA’s enforcement program will now be under additional scrutiny, adding pressure for the program to more consistently review the electronic submissions for “significant concerns.” This
heightened review process could potentially result in an increase in the number of disclosures EPA may deem ineligible after the fact. Because Audit Policy disclosures have only rarely been deemed ineligible after the disclosure and correction is completed, the new level of scrutiny suggests the regulated community should continue to be careful to disclose situations that are clearly within the Policy's terms and to weigh the pros and cons of disclosure in situations that may be somewhat ambiguous. Although concerns about ineligibility may still be relatively rare, regulated entities should keep in mind that any EPA increased review of one aspect of self-disclosures could also lead to greater scrutiny of compliance with all of the Agency’s Audit Policy criteria.

© 2022 Beveridge & Diamond PC

Source URL: https://www.natlawreview.com/article/epa-increases-scrutiny-self-reporting-through-edisclosure-system