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EPA Launches eDisclosure Portal and Modifies FOIA Presumption

Under EPA's [Audit Policy](#) and [Small Business Compliance Policy](#), companies that discover, promptly disclose, and expeditiously correct environmental violations may be entitled to penalty mitigation and other incentives. Earlier this year, EPA released a proposed plan for efficient and consistent disclosure of violation discoveries using an eDisclosure system to modernize voluntary self-disclosures. On December 9, 2015, EPA published a [Federal Register Notice](#) announcing the launch of EPA's new eDisclosure system.

The eDisclosure system consists of a web-based portal for reporting both Emergency Planning and Community Right-to-Know (EPCRA) and non-EPCRA violations under EPA's Audit Policy. The eDisclosure portal does not change any of the Audit Policy criteria, but it does dramatically change the manner in which the Audit Policy is implemented.

CATEGORIES OF DISCLOSURES

The new system establishes two categories for the automated assessment of almost all voluntary self-disclosures referred to as Category 1 and Category 2. EPA will continue to manually accept and process any new owner self-disclosures and any potential criminal violations disclosures to the Voluntary Disclosure Board (VDB).

Category 1 disclosures include routine EPCRA violations that involve reporting the presence of hazardous substances. Chemical release reporting under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 103 or EPCRA section 304 are not included in Category 1. EPCRA violations with significant economic benefit will likewise not qualify for Category 1. Category 1 disclosures will result in the automatic issuance of an electronic Notice of Determination (eNOD) confirming the violations are resolved with no assessment of civil penalties, assuming accuracy and completeness of the disclosure. EPA will perform periodic spot checks of Category 1 disclosures to prevent abuse.

Category 2 disclosures include all non-EPCRA violations, EPCRA violations not discovered through a systematic discovery process, and all other EPCRA and CERCLA violations excluded from Category 1. Category 2 disclosures will automatically be issued an Acknowledgment Letter (AL) indicating EPA's receipt of the disclosure and "promising that EPA will make a determination as to eligibility for penalty mitigation if and when it considers taking enforcement action for environmental violations."

eDISCLOSURE PROCESS

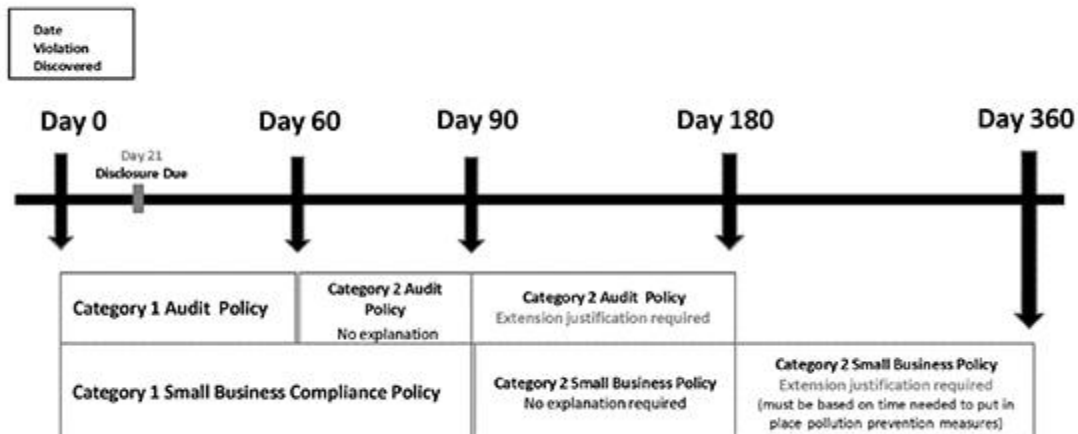
The eDisclosure portal requires entities to register with EPA's Central Data Exchange (CDX) system. Because the time period to voluntarily disclose is short, it is encouraged that entities register now to ensure access to the eDisclosure portal if necessary. The eDisclosure portal is not equipped to receive Confidential Business Information (CBI); therefore, a disclosing entity must electronically submit redacted information via the portal and submit any CBI manually in accordance with EPA procedures.

As was true under the old voluntary self-disclosure system, disclosing entities must certify compliance after the disclosure. Within 60 days of submitting a disclosure, the disclosing entity must submit a Compliance Certification via the eDisclosure portal. Disclosing entities may request up to an additional 30 days to correct Category 2 violations, with no explanation required. The eDisclosure system will automatically grant such requests, thereby extending the correction period and Compliance Certification due date. Longer requests for additional time may be made through the eDisclosure portal, provided they are accompanied by a justification and do not exceed 180 days after the date of discovery. While EPA plans to automatically extend the Compliance Certification due dates in the eDisclosure portal upon such longer requests, the agency is essentially reserving its rights to find that correction was not prompt, notwithstanding the due date extension, if and when it later decides to take enforcement action.

Category 1 disclosures are not eligible for extensions of time but potentially could be transitioned to Category 2 disclosures if more time is required to submit the Compliance Certification. Disclosing entities proceeding under the Small Business Compliance Policy are automatically provided the full 90-period for correction and Compliance Certification and more lenient extension criteria.

The figure below illustrates the time periods available for disclosure, correction, and Compliance Certification under both the standard Audit Policy and the Small Business Compliance Policy.

Violation Correction Time Periods



Note that while the deadline for correcting violations runs from the date of violation discovery, the deadline for certifying compliance runs from the date of the disclosure (which could be up to 21 days after discovery).

Credit: Federal Register, Vol. 80, No. 236 (Dec. 9, 2015) at 76479.

PREEXISTING UNRESOLVED DISCLOSURES

Entities with preexisting unresolved EPCRA disclosures may resubmit such disclosures through the eDisclosure system before April 7, 2016. All other preexisting disclosures not subject to an audit agreement or significant settlement negotiations will be treated as Category 2 disclosures. For these disclosures, EPA's Federal Register Notice serves as the Acknowledgement Letter. EPA will make a determination as to eligibility for penalty mitigation if and when enforcement action is taken.

INDIRECT CHANGES OF CONCERN

In the new era of EPA's streamlined eDisclosure portal, written resolutions documenting the agency's decision to pursue no penalty or enforcement action will only be available in limited Category 1 instances. In addition, not only is EPA planning to make this web portal the exclusive method for making most Audit Policy disclosures, it is also planning to maintain the centralized database out of EPA Headquarters. Information disclosed on the portal is expected to be public and accessible under the Freedom of Information Act (FOIA). Furthermore, EPA has reversed its approach on the public disclosure of unresolved compliance disclosures. EPA will now operate under a presumption in favor of public disclosure as it reviews such FOIA requests on a case-by-case basis.

If you have any questions, or would like to discuss this update further, please contact one of the following Robinson+Cole lawyers or any other member of the firm's [Environmental + Utilities Group](#):

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