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EPA Under Biden Signals Continuing Importance of Self-Disclosure

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On February 5, 2021, the U.S. Environmental Protection Agency (EPA) issued updated Frequently Asked Questions (FAQs) regarding its Audit Policy Program, signaling that the Biden Administration will continue to support proactive, self-disclosure of environmental violations in a policy previously encouraged by the Trump Administration. In 2018, EPA stressed the importance of self-auditing and self-disclosure. As a result, from 2018 to 2019, the number of entities taking advantage of this Program grew from 532 entities (operating 1,561 facilities) to 635 entities (operating 1,901 facilities).

EPA's newly issued FAQs provide clarification on EPA's self-disclosure policy, including guidance on the eDisclosure system launched in 2015 to modernize and streamline the submittal and processing of disclosed information. The FAQs are broken down into four primary categories:

- (1) General questions, which feature the nine conditions required to qualify under the Policy;
- (2) Questions related to eligibility of new owners under the Policy;
- (3) Questions on the eDisclosure system, including how to protect confidential business information; and
- (4) Questions related to small business compliance issues.

The document supersedes EPA's 1997 "Audit Policy Interpretive Guidance," 2007 "Frequently Asked Questions," and 2015 "eDisclosure FAQs," but adopts those clarifications and interpretations that remain relevant.

EPA's Audit Policy Program, established in 1995, emphasizes incentivizing regulated entities to voluntarily discover and correct violations. These incentives include significant reductions in gravity-based penalties and avoidance of a recommendation for criminal prosecution. To qualify for these benefits, nine conditions must be met to achieve the full benefits of a self-audit. These conditions include systematic, independent, and voluntary discovery; prompt disclosure in writing (within 21 days); and corrective and remedial action (within 60 days). In addition, violations must not be a part of a pattern of repeat violations, nor may the violations result in serious actual harm or present an imminent and substantial endangerment.

Ultimately, when deciding whether to take advantage of EPA's Audit Policy Program, clients should be aware of both the risks—failure to meet penalty mitigation conditions, failure to timely correct violations, and public awareness of non-compliance—and the benefits of disclosure.

Holland & Hart routinely advises businesses on the benefits and risks of

conducting environmental audits and self-disclosure of violations under both the EPA Audit Policy and state analogues across the Mountain West.