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# Anatomy of a TSCA Audit

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# Anatomy of a TSCA Audit

- Reasons to audit for TSCA compliance
- Pros and cons of using EPA's Audit Policy
  - Nine elements that must be met
  - Special considerations for new owners
  - Mechanics of using eDisclosure portal
  - Whether to seek an audit agreement
- Strategize and plan before starting



# Reasons to Audit for TSCA Compliance

Planning for compliance with TSCA reforms could drive a look-back effort to align chemical management programs

E.g., Inventory Reset requires reporting of 10 years of import data

Supply chain relationships and engagement

Significant penalty exposure for unreported HSE data discovered in an EPA inspection

*Elementis* EAB decision (2015) held no 5-year SOL if a continuing violation

Post-reform enforcement may increase

Recent TSCA enforcement focus has been CDR, Inventory, SNUR and substantial risk reporting

New electronic system coordination with Customs and Border Protection





# Pros and Cons of Using EPA's Audit Policy

# EPA Audit Policy

## Nine elements:

- Systematic discovery
- Voluntary discovery
- Prompt disclosure
- Independent discovery and disclosure
- Correction within 60 days
- Prevent recurrence
- No repeat violations
- No ineligible types of violations
- Cooperation



# EPA Audit Policy's Benefits

## Significant penalty reductions

- 100% reduction of gravity based civil penalties if all nine elements satisfied
  - EPA retains discretion on collecting economic benefit penalties
- 75% reduction of gravity based civil penalties if all 9 elements satisfied except discovery through a systematic process

## No criminal prosecution

- However, the nine elements already exclude from Policy eligibility the kinds of situations that could lead to a criminal referral, such as violations that:
  - Resulted in serious actual harm
  - Presented an imminent and substantial endangerment
  - Breached commitments under an existing enforcement order or agreement


## Audit reports not routinely requested

- If nine elements met, EPA will not routinely request copies of company's internal audit reports
- Relates to concerns over attorney client privilege and other issues
- But the audit process is an enforcement process so outcome intended to include public disclosure of audit results
  - Protect CBI/trade secrets


# New Owner Considerations



New Owner defined to exclude any entity that was responsible for the facility/violation at the time it occurred



Nine elements modified in some respects for new owner situation, e.g., have 45 instead of 21 days to disclose after discovery pre- and post-closing; nine months to audit; limited relief for inherited Title V permit reporting requirements; periodic element dropped since acquisition is a one-time event



Penalty relief also modified: No penalties for pre-closing violations; economic benefit for avoided O&M from date of acquisition may be assessed; capital expenditures not subject to economic benefit if corrective action is timely



# EPA's eDisclosure Portal

- Effective 12/9/15
- Centralized and web-based
- Strict application of 21 days to disclose and 60 days to correct
- Report actual violations not potential ones
- Certification requirement
- Written acknowledgement of submittal
- Outcome if/when EPA reviews submittal

# Whether to Seek an Audit Agreement

## Timing considerations

- Need more than 21 days to disclose
- Need more than 60 days to correct
- If new owner need more than 45 days or nine months to complete

## Coordination of Planning Compliance with TSCA Reform Requirements

- If reform applicability evaluation causes reason to believe some provisions of TSCA applied in the past and past compliance status is uncertain
- Starting or modifying corporate chemical programs in light of TSCA reforms

## Supply Chain Considerations

- TSCA reforms may drive changes in supplier relationships and data sharing, which could make meeting the nine elements more complicated
- Opportunity to update chemical data from and with suppliers – and related contracts and nondisclosure agreements - but takes time

## New EPA Actions/Enforcement Focus

- As EPA implements TSCA reform requirements, may drive questions about past compliance if EPA issues new or modified interpretations
- EPA enforcement will continue and may receive enhanced focus due to TSCA reforms taking shape



# Strategize and Plan

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## Is a TSCA Audit under EPA's Policy Beneficial?

- Level of chemical handling (what's our TSCA compliance risk profile?)
- Structure and strength of current chemical management programs
  - US
  - Global

## Could we meet the nine elements?

- Timing criteria especially important to consider regarding chemical data
  - Who owns the product chemistry data and where does it reside
  - Chemical transaction data – how is it organized
- Roles and relationships with suppliers and import/export brokers will impact timing and will need cooperation of third parties for some issues



# Strategize and Plan

- Is the eDiscovery portal realistic for how our company operates and, if not, how best to explore an entering an audit agreement with EPA without creating increased enforcement exposure?
- How much lead time would we need to organize data and resources to meet the nine elements?
- Structure under attorney-client privilege?
- Who will run and own the TSCA audit internally?
- What outside resources are needed to succeed?



# Thank you!



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