## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OECA–2007–0291; FRL–8309–2]**

## Enhancing Environmental Outcomes From Audit Policy Disclosures Through Tailored Incentives for New Owners; Notice

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice; request for comment.

**SUMMARY:** The Environmental Protection Agency (''EPA'' or ''the Agency'') requests comment on whether and to what extent the Agency should consider offering tailored incentives to encourage new owners of regulated entities to discover, disclose, correct, and prevent the recurrence of environmental violations. The Agency is considering whether actively encouraging such disclosures has the potential to yield significant environmental benefit, since new owners may be particularly well-situated and highly motivated to focus on, and invest in, making a clean start for their new facilities by addressing environmental noncompliance.

Any tailored incentives for new owners would be beyond those offered as EPA is currently implementing EPA's April 11, 2000 policy on ''Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,'' commonly referred to as the ''Audit Policy'' (65 FR 19618). These incentives would be designed to enhance implementation of the Audit Policy and encourage its use in the new owner context, but would not constitute a change to the Policy overall.

After the comment period closes, the Agency plans to review all comments and decide whether to develop a pilot program to test the policy of offering tailored incentives to encourage new owners to self-audit and disclose under the Audit Policy. Should the Agency decide to proceed, EPA would then publish a second **Federal Register** notice to seek comment on a proposed pilot program. After a second round of public comment, the Agency would publish in the **Federal Register**: The final description of the pilot program; an announcement of its start date; and a description of how its success in achieving increased self-auditing and disclosure and significant improvement to the environment will be evaluated.

**DATES:** EPA urges interested parties to comment in writing on the issues raised in this notice. Comments must be received by EPA at the address below no later than July 13, 2007. Comments may also be communicated orally at two public meetings EPA will hold during the comment period. The first meeting is scheduled for Washington, DC at the J.W. Marriott Hotel, 1331 Pennsylvania Ave., NW., on June 12, 2007. The second one is scheduled for San Francisco at the Palace Hotel, 2 New Montgomery St., on June 20, 2007. Both meetings will begin at 10 a.m. and end at 4 p.m.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OECA–2007–0291, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: docket.oeca@epa.gov*, Attention Docket ID No. EPA–HQ–OECA–2007–0291.
- *Fax:* (202) 566–9744, Attention Docket ID No. EPA–HQ–OECA–2007–0291.
- *Mail:* Enforcement and Compliance Docket Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OECA–2007–0291.
- *Hand Delivery:* Enforcement and Compliance Docket Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OECA–2007–0291. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov.* The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Enforcement and Compliance Docket Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

**FOR FURTHER INFORMATION CONTACT:** For further information, contact Caroline Makepeace of EPA's Office of Civil Enforcement, Special Litigation and Projects Division, at (202) 564–6012 or *makepeace.caroline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

#### *A. Introduction*

On April 11, 2000, EPA issued its revised final policy on ''Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,'' commonly referred to as the ''Audit Policy'' (65 FR 19618). The purpose of the Audit Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent

the recurrence of violations of Federal environmental law. Benefits available to entities that make disclosures under the terms of the Audit Policy include reductions in the amount of civil penalties and a determination not to recommend criminal prosecution of disclosing entities.

The Audit Policy program has been a successful effort to date, resolving disclosed violations with over 3,000 entities. However, more than half of these disclosures have involved reporting violations which, while important for public information and safety purposes, may not produce significant reductions in pollutant emissions once the violations are corrected. Consistent with EPA's strategic plan, the Agency's goal is to increase the number of self-disclosures that have the potential to yield significant environmental benefits while effecting compliance with Federal environmental requirements. EPA's recent experience with corporate-wide auditing agreements following a corporate merger or acquisition has heightened the Agency's interest in exploring whether encouraging new owners of regulated facilities to discover, disclose, correct, and prevent the recurrence of environmental violations would help EPA meet this goal. New owners may be particularly well-situated and highly motivated to invest in making a ''clean start'' for their new facilities by: Doing thorough self-audits of their new facilities; disclosing any violations found; promptly correcting the violations; and making the substantial improvements that will enhance their ability to remain in compliance going forward. Nevertheless, certain disincentives may stand in the way of new owners that may be interested in taking these steps, and there may be equitable reasons for considering particular incentives to encourage self-auditing and disclosure at the time a new owner takes control. The Agency is interested in developing this idea because of its potential to enhance EPA's efforts to effectively utilize scarce government resources by securing significant environmental improvement as quickly as possible. The Agency is also interested in whether offering tailored incentives in the new owner context may have unintended adverse consequences with respect to, for example, discouraging appropriate due diligence, timely compliance and a level playing field, or other negative effects. The Agency seeks comment on the potential for any positive or negative results that might come from providing such tailored incentives. The Agency also requests comment on how EPA could most efficiently determine who is a bona-fide new owner, and how the Agency should evaluate whether such incentives are successful in securing the prompt correction of environmental violations and significant improvement to the environment.

While EPA does not intend to amend the Audit Policy, the Agency is considering ways to enhance its implementation and encourage its greater use in new owner situations, particularly with regard to the disclosure and correction of violations that may yield significant pollutant reductions. Today, EPA issues this Notice signaling its intent to consider offering tailored incentives to self-report under the current Audit Policy for new owners of regulated facilities.

The purpose of this notice is to (1) solicit information to be used in helping EPA better understand and formulate decisions about key issues; and (2) provide notification of open meetings at which EPA hopes to hear from the public on these issues. Copies of the Agency's current Audit Policy may be found on the EPA's Web site at *http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html.*

*B. Background and History of the Audit Policy*

1. Overview of the Audit Policy

The Audit Policy provides incentives for regulated entities to detect, promptly disclose, expeditiously correct, and prevent the recurrence of violations of federal environmental requirements. The Audit Policy contains nine conditions, and entities that meet all of them are eligible for 100% mitigation of any gravity-based civil penalties that otherwise could be assessed in settlement. (''Gravity-based'' penalty refers to that portion of the civil penalty over and above the portion that represents the entity's economic gain from noncompliance, known as the ''economic benefit.'') Regulated entities that do not meet the first condition—systematic discovery of violations—but meet the other eight conditions are eligible for 75% mitigation of any gravity-based penalties. For criminal matters, EPA will generally elect not to recommend criminal prosecution by the Department of Justice (''DOJ'') or any other prosecuting authority for a disclosing entity that meets at least conditions two through nine (i.e., regardless of whether it meets the systematic discovery requirement) as long as its self-policing, discovery and disclosure were conducted in good faith and the entity adopts a systematic approach to preventing recurrence of the violation. The Audit Policy includes important safeguards to deter violations and protect the environment. For example, the Audit Policy requires entities to act to prevent recurrence of violations and to remedy any environmental harm that may have occurred. Repeat violations, those that result in actual harm to the environment, and those that may present an imminent and substantial endangerment are not eligible for relief under the Audit Policy. Entities and individuals also remain criminally liable for violations that result from conscious disregard of or willful blindness to their obligations under the law.

The Audit Policy and related documents are available on the Internet at *http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html*. Additional guidance for implementing the Policy in the context of criminal violations can be found at *http://www.epa.gov/compliance/resources/policies/incentives/auditing/auditcrimvio-mem.PDF*.

2. How EPA Implements its Voluntary Disclosure Programs

EPA's voluntary disclosure policies [1] are designed to provide major incentives for regulated entities that voluntarily discover, promptly disclose, and expeditiously correct violations, rendering formal EPA investigation and enforcement action unnecessary in most instances. The policies safeguard human health and the environment by providing incentives for regulated entities to come into compliance with the federal environmental laws and regulations, and enable efficient use of scarce government resources.

Most self-disclosures come into the Agency on a single facility basis. However, the Agency sometimes enters into an audit agreement under which the disclosing entity commits to undertake a comprehensive multimedia audit that will be conducted at a number of its facilities over an agreed-upon time frame. Corporate auditing agreements allow companies to plan a corporate-wide audit with advance understanding between the company and EPA regarding the scope of the audit, schedules (audit, reporting, and correction of violations), whether resolution will be judicial or administrative, and any other

[1] Besides the Audit Policy, EPA also implements another voluntary disclosure policy: The Small Business Compliance Policy (65 FR 19630), published April 11, 2000.

expectations. Such agreements also offer the potential for significant environmental benefit while providing greater certainty to companies about their environmental liabilities. Thus, EPA encourages companies with multiple facilities to take advantage of the Agency's Audit Policy through use of such corporate auditing agreements.

Once a regulated entity notifies EPA, in writing, of potential violations, EPA evaluates the discovery, disclosure, and correction of the violations against the criteria set forth in the Audit Policy, or if applicable, the Small Business Compliance Policy, and determines the appropriate enforcement response. If the disclosure does not meet the conditions of the applicable policy or the disclosing entity does not provide sufficient information to EPA to allow the Agency to make this determination, then the matter is handled under the appropriate medium-specific penalty policies, which often accommodate penalty mitigation for voluntary disclosures. The enforcement response for the vast majority of voluntary disclosures is a Notice of Determination (''NOD'') for cases involving no assessment of penalties. EPA retains its discretion to assess any economic benefit that may have been realized as a result of noncompliance. If the regulated entity has gained significant economic benefit, or if it failed to meet all the conditions of the applicable policy, then a civil penalty may be sought in an administrative or judicial action.

Overall, the Agency's voluntary disclosure programs continue to have positive results. The Audit and Small Business Compliance Policies have encouraged voluntary self-policing while preserving fair and effective enforcement and their use has been widespread. As of October 1, 2006, regulated entities and organizations have resolved actual or potential violations at 9,255 facilities.

Thus, the solicitation of comments on tailored incentives for new owners does not signal any intention to shift course regarding the Agency's position on self-policing and voluntary disclosures, but instead represents an attempt to enhance implementation of the Audit Policy, and encourage its increased use in the new owner context.

As mentioned in the Introduction, EPA's interest in exploring this approach stems in part from recent experiences in the Agency's current implementation of the Audit Policy. In the last few years, EPA has entered into corporate auditing agreements with several companies following a merger or acquisition valued at over $1 billion. These corporate auditing agreements provided a unique opportunity for companies to use self-disclosures to make a ''clean start'' with regard to environmental compliance. The Agency recognizes that taking steps to further encourage audit agreements in this context could offer the potential to garner significant environmental benefit.

3. How the Audit Policy Currently Applies to New Owners

On April 30, 2007, EPA issued the ''Audit Policy: Frequently Asked Questions (2007)'' which recognizes that owners of newly acquired facilities are uniquely situated to examine and improve performance at newly acquired facilities. Specifically, the 2007 Frequently Asked Questions provides that:

- New owners may be eligible for penalty mitigation under the Audit Policy for violations at newly acquired facilities which are discovered as part of a compliance examination agreed to be undertaken prior to the 1st annual certification under Title V of the Clean Air Act, or which are disclosed before that time.

Generally, Clean Air Act (CAA) violations discovered during activities supporting Title V certification requirements are not eligible for penalty mitigation under the Policy. Condition 2 of the Audit Policy requires that disclosed violations must not be discovered through a legally mandated monitoring or sampling requirement prescribed by statute or regulation; therefore, examination of CAA compliance accompanying a Title V annual certification is not voluntary.[2] However, EPA wants to encourage new owners to examine facility operations to determine compliance, correct violations, and upgrade deficient equipment and practices. Thus, for new owners that in good faith undertake such efforts and inform the Agency of such actions, either by disclosure in writing or entry into an audit agreement with EPA prior to submission of the facility's first annual Title V certification under new ownership, the violations disclosed would be considered voluntarily discovered for purposes of the Audit Policy.

The 2007 Frequently Asked Questions also provides that:

- New owners may be eligible for penalty mitigation under the Audit Policy for violations at newly acquired facilities irrespective of the disclosing entity's compliance history at other facilities.

EPA's primary interest is to encourage owners of newly acquired facilities to undertake a comprehensive examination of and improvements to a facility's environmental compliance and its compliance management systems. Notwithstanding a new owner's history of violations at its other facilities, if its efforts to examine and improve upon an acquired facility's environmental operations are thorough and are likely to result in improved compliance, EPA's intent is to encourage such examinations. The Audit Policy: Frequently Asked Questions (2007) can be found on the Internet at *http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html*.

*C. Role of Benefit Recapture in the Auditing Context*

The imposition of civil penalties that recapture the economic benefit of noncompliance is the cornerstone of the EPA's civil penalty program. Benefit recapture was adopted in 1984, and it has served the Agency and the public well. Benefit recapture has also been a part of the Audit Policy since it was first issued, on the premise that, even in self-audit and disclosure situations, penalties should not be reduced below the level necessary to recapture economic benefit when a violator has achieved an economic advantage over its complying competitors. Accordingly, the Audit Policy provides that EPA reserves the right to assess any economic benefit which may have been realized as a result of noncompliance, even where the entity meets all other Audit Policy conditions. The Audit Policy further provides that the Agency may also waive the economic benefit component of the penalty where the Agency determines that the economic benefit is insignificant (65 FR 19620).

Violators obtain an economic benefit from violating the law by delaying compliance, avoiding compliance or obtaining an unfair competitive advantage. When violators delay compliance, they have the use of the money that should have been spent on compliance to put into profit-making investments. Put simply, violators ''gain'' the interest on the amount of money that should have been invested in pollution control equipment. A

[2] Under the regulations governing CAA Title V permit applications and annual compliance certifications, any application, form, report or compliance certification is required to contain a certification by a responsible official of the truth, accuracy and completeness of information contained in such documents. The regulations further provide that ''[t]his certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.'' 40 CFR 70.5(d).

typical example is where a factory delays installation of a required waste water treatment facility. If the waste water treatment facility costs $1,000,000 to install, and the violator waits three years past the required date to comply, the violator has saved about $236,000 by delaying compliance.[3]

A second type of economic benefit is derived when a violator not only delays but avoids the costs it would have incurred if it had complied in a timely manner. A typical example would be where a factory avoids the operation and maintenance costs for the above-mentioned waste water treatment plant for the three years the polluter was out of compliance. If the facility's annual operation and maintenance costs are $100,000, then the violator probably saved about $200,000 by avoiding the operation and maintenance costs for three years (again assuming the violator is in the top tax bracket).

The third type of economic benefit is derived from the violator obtaining an unfair competitive advantage. For example, where a violator is selling banned products (e.g., DDT), any money made from the sale of this banned pesticide would be illegal.[4]

*D. Why is EPA Currently Considering Tailoring Incentives for Audit Policy Disclosures for New Owners of Regulated Entities?*

As previously stated, one of EPA's main goals is to secure the prompt correction of environmental violations and achieve significant improvements to the environment as expeditiously as possible. A number of factors, including the Agency's recent experience with corporate auditing agreements following large mergers and acquisitions, have highlighted the promising opportunity presented by encouraging new owners of regulated facilities to discover, disclose, correct, and prevent the recurrence of environmental violations.

It is reasonable to surmise that new owners may be particularly well-situated and highly motivated to focus on and invest in making a ''clean start'' for their new facilities and thus may be willing to conduct thorough self-audits of their new facilities, disclose any violations found, promptly correct the violations, and make the significant improvements that will enhance compliance going forward. If former owners were not timely about a facility's compliance obligations, the new owners may want to make a clean break with the past and get their newly acquired facilities into compliance promptly. It is possible that new owners may see the benefits of quickly assessing and working to limit their company's liability, and a firm with a widely-respected compliance record may want to ensure that any new acquisition develops a similarly positive record. Although some anecdotal accounts suggest that, in recent years, new owners have often had to make purchasing decisions based upon more limited information about environmental compliance issues than may have been available in the past, there has likely been at least some opportunity for pre-acquisition due diligence review. Even somewhat limited due diligence findings could help trigger a new owner's interest in more comprehensively assessing the facility's environmental status and exposure. New facility managers may also have access to new infusions of capital, which could enable the sort of improvements that yield significant benefit to the environment.

The Agency recognizes, however, that certain disincentives may stand in the way of new owners who are interested taking advantage of the Audit Policy. New owners may still have to pay substantial civil penalties under the Audit Policy, as only the gravity portion of the penalty can currently be mitigated. It stands to reason that new owners may be uncomfortable about calling EPA's attention to compliance issues at their newly acquired facilities when they themselves may not be fully aware of all the compliance issues presented. Particularly when many and/or complex facilities are involved, it may indeed be difficult for new owners to have a reasonable idea of the full spectrum of compliance issues.

In addition, the Agency's experience with implementing the Audit Policy, especially with regard to corporate auditing agreements, suggests that one of the major reasons a company may be hesitant to self-audit and disclose under the Audit Policy is uncertainty about how the Agency will treat such self-disclosures. One of the Agency's current goals is to provide greater overall certainty and consistency in the Audit Policy's implementation, and the recently-issued Audit Policy: Frequently Asked Questions (2007) should help to resolve such concerns generally. Nevertheless, there is likely still some hesitation on the part of new owners to self-disclose violations, because they worry about exactly how such disclosures will be handled by the Agency.

Encouraging new owners with tailored incentives that help address some of their concerns or alleviate some of their costs, in the context of a well-defined program that provides greater certainty about the handling of disclosures, may make the difference in their willingness to come forward and to commit to improving their environmental compliance and reducing their environmental footprint. There is a strong equitable argument that a new owner should not be penalized for economic benefit relating to violations that arose when a facility was not under the new owner's control, if that new owner is willing to promptly address violations and make changes to ensure the facility stays in compliance in the future. The Agency is also interested in exploring the idea of tailored incentives because it may present an opportunity to enhance EPA's efforts to effectively utilize scarce government resources, by securing high quality environmental improvements and achieving the most significant environmental benefit more quickly than might otherwise occur. Nevertheless, the Agency is also aware that such incentives may have unintended adverse consequences with respect to, for example, discouraging appropriate due diligence, timely compliance and a level playing field, or other negative effects, and EPA intends to consider the potential for such negative results as well.

*E. Objectives of Any Potential Pilot Program*

If, after review and consideration of all comments on this concept and on any draft incentive policy, the Agency decides it makes sense to test the approach of tailoring incentives to encourage new owners to utilize the Audit Policy, EPA would then develop a pilot program. Such a pilot program would be evaluated after three years and would be designed with four main objectives in mind:

1. The program should increase the number of self-audits and disclosures that yield significant environmental benefits.

2. The program should be transparent and straightforward. There should be clarity about the program's goals and how the Agency will handle those firms that self-audit and disclose violations, and the program should have sufficient

[3] This number was generated by the current version of the BEN computer model using the following assumptions: (1) The violator was in the average maximum tax bracket; (2) the violator's cost of money (i.e., the discount/compound rate) was 7.9%; and (3) inflation was based on the Plant Cost Index published in Chemical Engineering magazine. The BEN computer model can be found at *http://www.epa.gov/compliance/civil/econmodels/index.html*.

[4] For a more detailed discussion of how economic benefit is created, *see* **Federal Register** Notice of August 25, 2005, entitled ''Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases'' (70 FR 50326).

safeguards to ensure that only bona-fide new owners participate.

3. The program should be efficient to administer. EPA must develop a program that can be effective with the limited resources available to administer it. For instance, EPA does not envision analyzing the various financial details of each merger or acquisition.

4. The program should also have minimal transaction costs for the regulated entities participating in the program. While the compliance costs for the firms participating may be substantial, the actual participation in the program should be cost-effective.

**II. Issues**

The Agency is seeking comment limited to: (1) Whether EPA should offer tailored incentives to encourage new owners of regulated entities to discover, disclose, correct and prevent environmental violations; (2) how should the Agency determine who is a new owner; (3) what incentives should the Agency consider offering in order to encourage new owners to self-audit and disclose; and (4) if such tailored incentives are offered, what measures should the Agency use in determining whether and to what extent self-audits and disclosures from new owners are achieving significant improvements to the environment.

*A. Should the Agency Offer Tailored Incentives to Encourage New Owners of Regulated Entities to Self-Audit and Disclose Violations?*

Are tailored incentives needed and/or appropriate to encourage self-audits and disclosures by new owners of regulated entities? Do the circumstances of new ownership warrant special consideration or handling, if the new owner was not responsible for creating a violation and there exists potentially significant environmental benefit that could result from new owners' disclosures and correction of violations? Or, does the Audit Policy as currently implemented already offer sufficient incentives to induce new owners to undertake self-audits and disclosures?

1. Due Diligence in Mergers and Acquisitions

Anecdotal accounts suggest that, in today's merger and acquisition market, acquiring firms often have to make decisions about a target acquisition under tight deadlines and with relatively minimal information about an entity's environmental compliance status or problems. These accounts indicate that the traditional paradigm of assuming that due diligence review will yield full knowledge to the purchaser about any potential acquisition may not be accurate in many current mergers and acquisitions. EPA suspects that the amount of environmental compliance due diligence varies greatly depending on the industrial sector involved, or on whether a certain target facility's or company's environmental compliance is likely to present an important or material issue (e.g., environmental compliance would be more germane to the purchase of a chemical company than of a financial services firm). EPA seeks comment on the extent to which pre-acquisition due diligence reviews reveal environmental noncompliance (as opposed to environmental contamination and remedial liability).

Providing tailored incentives to self-audit and disclose could potentially improve environmental compliance in these situations by encouraging in-depth auditing after purchase. On the other hand, providing such incentives could cause sellers to further delay or avoid compliance (i.e., a firm might be tempted to sell off a unit to another business in its noncompliant state rather than bring that unit into compliance), or could have the unintended effect of encouraging buyers to perform inadequate due diligence. EPA seeks comment on whether it would be appropriate to require that new owners have performed a certain level of pre-acquisition due diligence to qualify for tailored incentives, and if so, what that level should be? The Agency also seeks comment on the potential effects on environmental compliance and on due diligence reviews that might result from offering tailored incentives for new owners.

2. Purchase Price Calculation

If, as the anecdotal reports mentioned above would indicate, the due diligence that potential buyers perform may have substantial gaps with regard to information about environmental compliance issues, what is the effect on acquisition negotiations? If an acquiring company had perfect information, presumably it would adjust its offered purchase price to account for any anticipated environmental liabilities associated with the target firm. But, without good information, the buyer's offer may not reflect adjustments for the cost of environmental noncompliance. EPA seeks comment on the extent to which environmental noncompliance liabilities (as distinguished from environmental remediation liabilities) are reflected in purchase price, and whether tailored incentives should take this into account.

3. Indemnification Agreements Between Purchaser and Seller

The Agency is aware that, in acquisition situations, sellers may indemnify purchasers across a broad range of issues, including environmental liability. If a selling firm has indemnified the purchaser for violations which are ultimately disclosed by the new owner, are tailored incentives to self-report needed at all? On the other hand, the mere existence of an indemnification agreement does not insulate the purchaser from liability. Given the Agency's interest in encouraging appropriate accountability and buyer/seller agreements on environmental compliance issues, how should EPA take indemnification agreements into account in designing any tailored incentives? Should the existence or terms of an indemnification agreement have any bearing on a new owner's eligibility for tailored incentives and, if so, how? The Agency seeks comment on all the questions above.

4. Other Requirements for Incentives

Should the Agency consider other eligibility criteria or participation requirements if a program to offer tailored incentives is developed?

*B. What Constitutes a ''New Owner'' for Purposes of Being Offered Tailored Incentives under the Audit Policy?*

If EPA develops a pilot program offering incentives to new owners, the Agency's goal would be to ensure that only bona-fide new owners can participate. There should be no possibility that a firm could evade significant environmental liabilities by making superficial changes designed to make it appear as if the regulated entity has a new owner. The Agency believes that, in the context of eligibility for tailored incentives, only ''arm's length'' transactions can produce ''new owners.''

However, the Agency does not have the resources necessary to delve into complex corporate structures and histories to make determinations about the authenticity of new ownership in the context of such Audit Policy self-disclosures. The Agency seeks comment on a clear, straightforward and easily administered approach to determining ''new ownership'' and eligibility for tailored incentives, and on the specific questions posed below.

1. What should a company need to provide to demonstrate to the Agency that it is a bona-fide ''new owner?''

What should the standard be, to demonstrate ''new ownership'' in this

context? Should the Agency require each company to self-certify to the government that it is indeed a bona-fide new owner, and eligible for tailored incentives? If a self-certification is appropriate in this situation, what should it contain? Should other proof be offered along with the self-certification?

2. How long after an acquisition is an owner still ''new'' for the purpose of being offered tailored incentives?

The Agency is seeking a clear approach to use in making such determinations. While EPA wants to encourage new owners to avail themselves of this process, there must be a time limit for the new owners to address environmental violations that began prior to their assuming ownership. Otherwise, the Audit Policy's goal of encouraging regulated entities to self-audit and promptly correct noncompliance could be undermined.

3. How should the Agency treat different acquisition transactions?

Should the Agency make any distinctions between acquisitions and mergers? How should EPA handle disclosures by reorganized companies that emerge from Chapter 11 bankruptcy? Should companies in which the controlling interest is purchased by a new firm with no plans to participate in management or operations be eligible for incentives? How should the Agency treat companies that are purchased by their employees, who were employed by the company when noncompliance began?

*C. What Incentives Should the Agency Consider to Encourage New Owners to Self-Disclose?*

EPA is also inviting comment on what tailored incentives might be appropriate to encourage self-auditing and disclosures from new owners. EPA has identified three major potential incentives: (1) Reducing civil penalties beyond what the current Audit Policy provides, by reducing any economic benefit portion of the penalty; (2) allowing Audit Policy consideration of violations which would otherwise be ineligible, because their discovery is legally mandated and thus not discovered voluntarily; and (3) providing recognition from the Agency to new owners who self-audit and disclose under the Audit Policy.

EPA is seeking comment on these three possible incentives as well as on any alternative approaches that might be effective. Commenters suggesting other incentives are requested to clearly describe those incentives and how they would function in the Audit Policy context.

In addition, there are some specific questions associated with the three potential incentives suggested above on which EPA is seeking comment:

1. How should economic benefit be calculated for disclosures by new owners?

a. When should the clock start running when calculating economic benefit?

The current practice is to calculate economic benefit forward from the date a violation first occurred. This method can result in benefit calculations so large that they serve as a disincentive to self-report, especially in the context of certain types of statutory violations, which may be longstanding and require multi-million dollar capital and operating cost expenditures to remedy. Additionally, most new owners would be averse to paying significant economic benefit amounts when they were not in control of the facility when the violations occurred and had little or no knowledge of them at the time of purchase. An alternative method of calculating benefit in the new owner context would be to commence calculating economic benefit from the date the facility was acquired; another possibility might be to use the date the post-acquisition audit was completed. If the latter, how long should a new owner be given to complete the audit? Another approach might be to give the new owner a reasonable time after acquisition to put on controls, particularly where those controls are complex, and to calculate benefits for delays beyond the reasonable period.

b. Should the economic benefit calculation take into account whether and the extent to which the seller has indemnified the buyer?

As discussed above, in Section II.A.3.of this Notice, the Agency is aware that, in many acquisition situations, the seller has indemnified the new owner from liability from a whole host of issues, often including certain environmental liabilities. The Agency seeks comment specifically on whether such indemnification arrangements should have any bearing on the calculation of penalties for economic benefit, as a potential incentive.

c. In calculating economic benefit, should the Agency allow the new owner to offset the cost of the audit?

Some self-audits can be expensive, particularly for large, complex facilities. One incentive might be to offset the cost of the audit from the economic benefit calculation. A fair, objective and efficient way of establishing the cost of the audit would be critical to this approach, especially when an audit has been performed by the company itself, rather than by an outside third-party auditor.

2. Should EPA allow consideration under the Audit Policy of violations which might otherwise be excluded, when the disclosures come from new owners?

As described in Section I.B.3.of this Notice, EPA's recently issued Audit Policy: Frequently Asked Questions (2007) makes new owners eligible for Audit Policy penalty mitigation for violations at newly acquired facilities, when the violations are discovered as part of a compliance examination agreed to be undertaken prior to the first annual certification under Title V of the Clean Air Act, or are disclosed to EPA before that time. An additional suggested incentive is to allow consideration under the Audit Policy of certain other violations (e.g., Risk Management Program (RMP) under CAA 112(r)(7)) which may otherwise be ineligible for Audit Policy penalty mitigation. As noted above, Condition 2 of the Audit Policy requires that disclosed violations must not be discovered through a legally mandated monitoring or sampling requirement prescribed by statute or regulation. Therefore, for example, examination pursuant to a RMP Triennial Audit would not normally be considered voluntary. Since EPA wants to encourage new owners to examine compliance and operations at their newly-acquired facilities, correct violations and upgrade deficient equipment and practices, should new owners that in good faith undertake a RMP triennial Audit and inform the Agency of violations, which existed prior to acquisition and are discovered through the audit, be eligible for Audit Policy consideration? Are there other similar categories of violations disclosed by new owners that should be eligible for Audit Policy consideration?

3. Should the Agency provide recognition to new owners who self-audit and disclose under the Audit Policy?

Would positive recognition by the Agency, commending a new owner's willingness to voluntarily audit and disclose, encourage a company to undertake such actions? One suggestion has been to create and publicize a list that recognizes companies that have stepped forward to examine compliance and operations at their newly acquired facilities, correct violations and upgrade

deficient equipment and practices. What sort of recognition, if any, would be most desirable?

*D. Measures of Success*

If the Agency decides to develop a policy for tailored incentives for new owners, EPA intends to develop a three-year pilot program to test the effectiveness of such incentives. In order to objectively, effectively and promptly evaluate the pilot program and this approach, EPA must have already identified clearly measurable outcomes and efficient assessment methodologies. The main goal of this program, and the most important measure of success, would be to show that compliance with environmental laws and regulations has improved, and that significant environmental benefit has been attained. However, there are different approaches for determining how well these goals have been met.

What measures of success should the Agency adopt for the evaluation of a pilot program? Important outcomes to consider could be the number of disclosures made under the pilot program, the significance of the violations involved, and the significance of the pollutant reductions that can be attributed to or associated with these disclosures. Transparency of the program, efficiency in administration, and low transaction costs are also issues to be considered in evaluating the tailored incentive approach. EPA is seeking comment on any potential measures, and on the methodologies necessary to accurately measure them.

**III. Public Process**

As part of EPA's effort to obtain input on whether to offer tailored incentives for new owners self-disclosing under the Audit Policy, the Agency is planning to hold two public comment sessions. At those two meetings, interested parties may attend and provide oral and written comments on the issues. The first meeting is scheduled for Washington, DC at the J.W. Marriott Hotel, 1331 Pennsylvania Ave., NW., on June 12, 2007. The second one is scheduled for San Francisco at the Palace Hotel, 2 New Montgomery St., on June 20, 2007. Both meetings will begin at 10 a.m. and end at 4 p.m.

The Agency is especially interested in comments relating to the issues specified in this Notice. After the comment period closes, the Agency plans to review and consider all comments. If EPA decides to develop a pilot program offering tailored incentives to new owners beyond those currently available under the Audit Policy, the Agency would then publish a second **Federal Register** notice to seek comment on such a proposed pilot program. After a second round of public comment, the Agency would publish in the **Federal Register**: The final description of the pilot program; an announcement of its start date; and a description of how its success in achieving increased self-auditing and disclosure and significant improvement to the environment will be evaluated. EPA encourages parties of all interests, including State and local government, industry, not-for-profit organizations, municipalities, public interest groups and private citizens to comment, so that the Agency can hear from as broad a spectrum as possible.

**IV. What Should I Consider as I Prepare My Comments for EPA?**

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the Notice; Request for Comments by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The Agency may ask you to respond to specific questions.
- Explain why you agree or disagree; suggest alternatives and language.
- Describe any assumptions and provide any technical information and/or data that you used.
- If possible, provide any pertinent information about the context for your comments (e.g., the size and type of acquisition transaction you have in mind).
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Submit your comments on time.

Dated: April 30, 2007.

**Granta Y. Nakayama,**

*Assistant Administrator, Office of Enforcement and Compliance Assurance.*

[FR Doc. E7–9197 Filed 5–11–07; 8:45 am]

**BILLING CODE 6560–50–P**

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### Notice of Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Equal Employment Opportunity Commission.

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** 72 FR 26115, Tuesday, May 8, 2007.

**PREVIOUSLY ANNOUNCED DATE AND TIME OF MEETING:** Wednesday, May 16, 2007, 9:30 a.m. Eastern Time.

**CHANGE IN THE MEETING:**

*Open Session*:

Item Nos. 3. Full-Service Publication Storage and Distribution Center Contract has been removed from the Agenda.

**CONTACT PERSON FOR MORE INFORMATION:** Stephen Llewellyn, Acting Executive Officer, on (202) 663–4070.

Dated: May 10, 2007.

**Stephen Llewellyn,**

*Acting Executive Officer, Executive Secretariat.*

[FR Doc. 07–2386 Filed 5–10–07; 8:45 am]

**BILLING CODE 6570–01–M**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Assessment Rate Adjustment Guidelines for Large Institutions and Insured Foreign Branches in Risk Category I

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final guidelines.

**SUMMARY:** The FDIC is publishing the guidelines it will use for determining how adjustments of up to 0.50 basis points would be made to the quarterly assessment rates of insured institutions defined as large Risk Category I institutions, and insured foreign branches in Risk Category I, according to the Assessments Regulation. These guidelines are intended to further clarify the analytical processes, and the