

## Legal Updates & News

### Bulletins

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## EPA Tailors Incentives to New Owners of Facilities and Businesses under its Audit Policy

June 2007

### LUEL Briefing, June 27, 2007

Under its Incentives for Self-Policing: Discovery, Disclosure, Correction, and Violations (“Audit Policy”), the Environmental Protection Agency (“EPA”) is considering whether to offer tailored incentives to “new” owners who acquire facilities or businesses discovered to be in violation of environmental regulations. Incentives tailored towards new owners would encourage them to self-audit and report violations in recently acquired facilities, possibly through the promise of a reduction or forgiveness of the penalties for economic benefit.

Through its new initiative, EPA seeks more self-reporting and correction of violations that result in actual emissions of pollutants, as opposed to recordkeeping or reporting violations. EPA believes it may be productive to direct the incentives of its policy towards companies involved in large-scale mergers or acquisitions.

Some of the issues upon which EPA requests comment are:

- **How should the EPA define “new owner”?** The EPA is seeking a clear and easily administered definition of what constitutes a new owner, what should be required for proof of new ownership, how long an owner remains “new,” and how different acquisitions should be treated. The EPA also asks whether new owners should be required to do a certain level of pre-acquisition due diligence, and if the value of an indemnity agreement should be taken into account when offering forgiveness for the economic benefit penalty.
- **What are the objectives of a pilot program?** EPA may develop its new policy by means of a pilot program. Industries or sectors affected by a pilot program are encouraged to comment.

The EPA announced its new policy on May 14, 2007 and held two public workshops. The EPA has opened a public comment period that will last through July 13, 2007. At the close of the first comment period, the EPA will review all comments and decide whether to offer a pilot program with tailored incentives to new owners. The EPA will then seek a second round of comments on the proposed pilot program.

Morrison & Foerster’s LUEL group has assisted numerous companies in making disclosures under the existing Audit Policy. Working closely with our corporate group, we also advise clients in due diligence and issues involved in high-level acquisitions.