# NEW ADMINISTRATION READINESS CHECK-UP: COMPLIANCE AUDIT PROGRAMS

***Author's Note: This is the second in a series of articles that will address the practical impacts of the results of the recent elections on the regulated community's environmental compliance activities.***

In the first article of my *New Administration Readiness Check-up* series, I discussed how the regulated community can prepare itself for a likely increase in federal enforcement inspection activity due to the transition from a Republican to a Democratic presidential administration.[1] In this next article, I also focus on being prepared for enforcement activity, but from a somewhat different perspective. More specifically, I focus on how a transition of power in Washington, D.C. might impact two types of compliance audit activities conducted by regulated entities: (i) regulatorily-required auditing under EPA's Risk Management Plan (RMP) Rule; and (ii) general compliance auditing in the context of various federal or state compliance audit incentives.

With respect to the audit requirements under the RMP Rule, the current administration recently repealed regulatory provisions requiring the use of third parties in certain circumstances when conducting audits of process safety programs under this rule. This third-party audit requirement had gone into effect in the waning days of the Obama Administration. The Biden Administration will probably try to re-instate it.

As for compliance auditing in general, the Biden Administration can be expected to have a different philosophical view of state incentives for conducting compliance audits. The Trump Administration has encouraged the use of self-disclosure policies and other similar policies that are designed to incentivize regulated entities to conduct compliance audits. This particular emphasis may have played a role in encouraging states such as Oklahoma and Louisiana to enact, or to at least consider, audit privilege and immunity laws and regulations. The Biden Administration will likely convey a different tone, which in turn may impact both existing and planned state incentives for conducting compliance audits.[2]

It can be easy to see why this sort of "regulatory ping-pong" can create uncertainty about how to respond. Compliance audit programs typically operate on three-year cycles, so it can be

[1] This article, *New Administration Readiness Check-Up: Compliance Inspections*, can be found at the website for my law practice, Daniel J. Brown, L.L.C. – www.djbrownlaw.com.

[2] At the federal level, EPA's primary audit policy, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice*, 65 Fed. Reg. 19,618 (Apr. 11, 2000)(commonly referred to as the EPA Audit Policy), has existed in its current form for over 20 years now, so it is unlikely that the Biden Administration will make any significant changes to this particular self-disclosure program.

difficult to plan and implement such programs when the regulations and policies impacting them change every four years. However, rather than focus too much time and energy on these likely regulatory and policy changes, it is useful to consider the fundamental reasons for conducting such audits in the first place. What is the real value proposition associated with a compliance audit program? Is it to check a regulatory compliance box or to obtain immunity from possible enforcement action? Or is it to ensure effective governance, protect employees, the public, and the environment, and operate safely? In most cases, it is the latter.

This is not to understate the importance of complying with the mandatory provisions of regulatorily-required audit programs, or of obtaining the benefit of various federal or state incentives for conducting general compliance audits. However, to the extent feasible, facilities should consider looking beyond these regulatory and policy drivers when designing and implementing compliance audit programs. In the case of audit programs under the RMP Rule, facilities should consider the value that may be added by using outside third-party expertise, regardless of whether such use is required. Process safety management is a complex activity that requires a lot of operational expertise and attention to detail. Facilities may accrue significant benefits by using experienced consultants who have fresh and independent perspectives.

In the case of general environmental compliance programs, facilities should consider how these programs might operate even in the absence of any of any state audit privilege and immunity laws. Audit programs can still be designed with an eye towards accruing the benefits of audit privilege and immunity laws, but they should be robust enough to provide genuine value even if such laws did not exist.

In summary, facilities can maximize the value they obtain from their respective compliance audit programs by focusing more on the presumed fundamental purposes of these programs and less on how regulatory and policy changes might impact their implementation. In so doing, these facilities will also find themselves better prepared for the anticipated increase in federal enforcement activity following the upcoming transition of presidential power.[3]

***The next topic in this series will be about how understanding the material and energy balances of your company's operations can aid you in preparing for the sustainability-related initiatives that are likely to be pursued by the new administration.***



[3] See, *New Administration Readiness Check-Up: Compliance Inspections.*