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Updated: Trump Administration Clarifies Criminal Enforcement Priorities

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On May 9, 2025, the White House issued an executive order, titled "Fighting Overcriminalization in Federal Regulations," that could have a significant impact on the administration's enforcement of criminal regulatory violations. Beginning with the simple premise that "the United States is drastically overregulated," the EO cites the over 48,000 sections of the Code of Federal Regulations (CFR) that exceed 175,000 pages as an "absurd and unjust" circumstance that "can lend itself to abuse and weaponization by providing Government officials tools to target unwitting individuals"—and impacting "average Americans" in particular. As a result, the stated purpose of the EO is "to ease the regulatory burden on everyday Americans and ensure no American is transformed into a criminal for violating a regulation they have no reason to know exists."

EO's statements of policy regarding enforcement of criminal regulatory offenses

The EO broadly resets administration policy to disfavor criminal enforcement of criminal regulatory offenses, with prosecution "most appropriate for persons who know or can be presumed to know what is prohibited or required by the regulation and willingly choose not to comply, thereby causing or risking substantial harm." The EO clarifies that any "[p]rosecutions of criminal regulatory offenses should focus on matters where a putative defendant is alleged to have known his conduct was unlawful."

In addition, regarding strict liability offenses—which do not require the government to prove a defendant's intent—the EO instructs agencies to

"consider civil rather than criminal enforcement," or if appropriate, administrative enforcement. Finally, the EO provides that agencies promulgating regulations that may permit criminal enforcement "should explicitly describe the conduct subject to criminal enforcement," cite the authorizing statutes, and provide the applicable *mens rea* (or "intent") standard. Notably, the EO generally exempts laws or regulations concerning either immigration or national security and defense from these policy statements or agency requirements.

EO requires agencies to publicly post and annually update all criminal regulatory offenses, penalties, and intent standards

After outlining these broad policy principles, the EO orders individual administrative agencies to take several steps in consultation with the Attorney General, with an eye towards transparency. First, within 365 days and annually thereafter, each agency must publicly post online all criminal regulatory offenses enforceable by either the individual agency or the U.S. Department of Justice (DOJ), the range of potential criminal penalties, and the applicable *mens rea* standard for such offenses. Related to that, individual agencies are "strongly discouraged" from engaging in criminal enforcement for offenses not on that publicly available list and consider whether an offense is on that list even before initiating an investigation. In addition, for any proposed or final regulations going forward, agencies should consult with DOJ to include a statement that identifies any criminal regulatory offense, as well as provide the *mens rea* requirement and corresponding federal statutory citations.

In the much shorter term—within 45 days of the EO's issuance—each federal agency was required to publish guidance in the Federal Register, in consultation with the DOJ, "describing its plan to address criminally liable regulatory offenses." In doing so, the EO instructed that each agency should make clear that when deciding whether to refer alleged violations of criminal regulatory offenses to the DOJ, the agency will consider factors such as: (1) the harm or risk of harm; (2) the potential gain to the putative defendant; (3) whether the putative defendant held specialized knowledge, expertise, or was licensed in an industry related to the rule or regulation at issue; and (4) available evidence of the putative defendant's "general awareness of the unlawfulness of his conduct as well as his knowledge or lack thereof of the regulation at issue."

In recently publishing that required guidance, several federal agencies generally reiterated these same four factors governing future referrals and advised the public that by May 9, 2026, they would provide the required publicly available information outlined in the EO. *See, e.g., Guidance on Referrals for Potential Criminal Enforcement,* U.S. Dep't of Treasury (July 3, 2025), 90 Fed. Reg. 29628-03, *Guidance on Referrals for Potential Criminal Enforcement*, U.S. Dep't of Health & Human Servs. (June 24, 2025), 90 Fed. Reg. 26822-01. However, some agencies provided at least some additional clarification concerning their respective plans to address criminal regulatory offenses. For example, in guidance published on June 25, the U.S. Department of Labor (DOL) listed additional factors it would

consider in making referral decisions, such as: (1) whether an employee was seriously injured or died as a result of the relevant conduct; and (2) whether the defendant has deliberately impeded the Department's investigative efforts. *See Guidance on Referrals for Potential Criminal Enforcement*, U.S. Dep't of Labor (June 25, 2025), 90 Fed. Reg. 27057-01. As another example, the Consumer Financial Protection Bureau (CFPB) explicitly noted certain CFPB regulations that are enforceable by a criminal penalty, including the Truth in Lending Act, Real Estate Settlement Procedures Act, and the Electronic Fund Transfer Act. *See Guidance on Referrals for Potential Criminal Enforcement*, U.S. Consumer Fin. Prot. Bureau (June 27, 2025), 90 Fed. Reg. 27530-01.

As the fact sheet accompanying the EO states, the administration has prioritized initiatives to "slash regulations" and "streamline government," and this EO would appear to align with the administration's broader initiative to decrease regulations generally.

Implications of the EO for individuals and businesses

In the very short term, the EO will likely not create any meaningful change for individuals and businesses facing federal regulatory investigations and enforcement actions, given that agencies have one year to make their first public posting of all criminal regulatory offenses. Related to that, it appears that the initial guidance published by federal agencies did not provide significantly detailed clarity above and beyond what was already highlighted in the EO. However, the EO nevertheless appears to be meaningful and indicative of change to come on the enforcement front.

The EO does not alter any current statutes or regulations' intent requirement or require that agencies either eliminate or lower the level of intent required for any offense. However, the EO signals a growing sympathy to—or at least recognition of—the idea that individuals and businesses are often subject to so many regulations that it is highly plausible to violate a particular criminal provision that provides for criminal penalties without the intent to do so. As a result, particularly in this next 365 days before agencies make their first public posting of all such criminal regulatory provisions in May 2026, would-be defendants may have a window of opportunity to emphasize, if applicable, a lack of intent or knowledge about potential regulatory requirements that create potential criminal liability.

However, in the longer term, this added transparency of the public posting requirement of regulations with criminal penalties may prove to be a double-edged sword for individuals and businesses. To the extent such provisions are now more prominently posted and available in the years to come, future defendants may—somewhat ironically—have a more difficult time successfully asserting in the long term that they were unaware of regulations that provide for potential criminal liability.

Second, for regulatory violations that provide both civil and criminal enforcement options, defendants may experience more aggressive civil enforcement actions and interest by the government to secure settlements that include civil fines as a substitute for a criminal prosecution. Enforcement of the False

Claims Act (FCA), a law that imposes civil liability for violations, illustrates this point clearly, as DOJ has recently pursued FCA cases in connection with fraudulent Paycheck Protection Program loan applications, even when avenues for criminal enforcement are available.

Third, and relatedly, to the extent that federal regulatory criminal enforcement declines, some State Attorneys General may seize upon that trend and increase enforcement on the state front. As one Democrat State AG recently put it: "States must fill the enforcement vacuum being left by federal regulators who are giving up under the new administration and abandoning these important cases." As one recent example of this, one State Attorney General recently issued a legal advisory stating that his office would undertake FCPA enforcement on the state level after another recent EO largely halted federal Foreign Corrupt Practices Act (FCPA) criminal enforcement.

What this means to you

Although seeking to relieve "average Americans" of regulatory overload, the EO could potentially have impacts on larger businesses as well. Companies should track closely how individual agencies respond to the EO over the next year and determine whether adjustments to compliance are required.

Contact us

If you have questions regarding this EO or how it could impact compliance programs, please contact Matt Diehr, Rebecca Furdek, or your Husch Blackwell attorney.