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Guidance on Referrals for Potential Criminal Enforcement: U.S. Environmental Protection Agency Notice

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The United States Environmental Protection Agency ("EPA") published in the July 31st Federal Register what it describes as its:

...plans to address regulatory offenses that give rise to criminal liability under the recent executive order on Fighting Overcriminalization in Federal Regulations.

See 90 Fed. Reg. 36044.

President Trump issued an Executive Order on May 9th titled:

Fighting Overcriminalization in Federal Regulations ("EO").

See 90 Fed. Reg. 20363.

The EO required that within 45 days of its issuance that in consultation with the Attorney General, each federal agency should publish guidance in the Federal Register describing its plan to address criminally liable regulatory offenses.

The federal environmental statutes that EPA administer can impose criminal liability in certain circumstances.

EPA states in the July 31st Federal Register Notice that in consultation with the Attorney General, it will provide to the Director of the Office of Management and Budget ("OMB") a report containing:

1. A list of all criminal regulatory offenses enforceable by Agency or the Department of Justice ("DOJ"); and
2. For each such criminal regulatory offense, the range of potential criminal penalties for a violation and the applicable mens rea standard for the criminal regulatory offense.

The Notice is caveated by EPA's statement that it constitutes a general policy subject to:

...appropriate exceptions and to the extent consistent with law, that when the Agency is deciding whether to refer alleged violations of criminal regulatory offenses to DOJ, officers and employees of EPA should consider, among other factors:

- the harm or risk of harm, pecuniary or otherwise, caused by the alleged offense;

- the potential gain to the putative defendant that could result from the offense;
- whether the putative defendant held specialized knowledge, expertise, or was licensed in an industry related to the rule or regulation at issue; and
- evidence, if any is available, 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.

EPA states that it has historically considered each of the referenced factors as a matter of formal policy and in practice when:

- referring alleged violations of criminal regulatory offenses to DOJ.
- deciding whether to open a formal investigation in the first place.

EPA cites the 1994 document, *The Exercise of Investigative Discretion*.

A copy of the Federal Register Notice can be downloaded [here](#).