

Biden Administration Changes to Enforcement Policies

This year, the Biden Administration has ushered in changes to enforcement guidance and policy, including criminal self-disclosures and deference to State regulators. In addition, the Administration has further bolstered its environmental justice priorities.

New DOJ Self-Reporting Policy for Criminal Violations

In February, the U.S. Department of Justice issued a new policy addressing voluntary self-disclosures for criminal enforcement actions for all U.S. Attorneys' offices. The policy offered discounts on fines and non-guilty plea resolutions when issues are timely self-reported. Under the policy, companies must self-report all material facts regarding misconduct prior to the imminent threat of misconduct being publicly known or discovered during a government investigation, setting forth three main criteria:

1. Disclosure must be made voluntarily (and not pursuant to a preexisting obligation to disclose, whether by regulation, contract or prior Department resolution).
2. Disclosure is made (a) prior to an imminent threat of disclosure or government investigation; (b) prior to the misconduct being publicly disclosed or otherwise known to the government; and (c) within a reasonably prompt time after the company becomes aware of the misconduct, with the company having the burden to demonstrate timeliness.
3. Disclosure must include all relevant facts concerning the misconduct that are known to the company at the time of the disclosure.

The new Policy describes several benefits of self-disclosure. For companies meeting the above criteria, as well as fully cooperating and implementing appropriate remediation, a U.S. Attorney's office will not seek a guilty plea absent aggravating factors (such as threats to national security, pervasive problems within the company, or involvement of current executive management). Remediation includes agreeing to pay all disgorgement, forfeiture, and restitution resulting from the misconduct.

Declinations are possible, in addition to deferred prosecution agreements and non-prosecution agreements. Where an effective compliance program has been developed, monitoring may not be required. No penalty, or penalties capped at 50% of the advisory sentencing guidelines, may be imposed.

Changes to EPA Cooperative Federalism Policy

EPA announced an enforcement policy shift in June, revising the policy for interactions with state regulators. The revised policy alters the degree of deference due to state regulators. Whereas the pre-existing 2018 and 2019 Trump-era guidance expressed "general deference to states and tribes implementing federally delegated programs" and afforded states and tribes the "primary role" in implementing such programs, the new policy redefines the relationship, stating:

EPA no longer ... defers to states regarding federal programs implemented by the states. Rather, cooperative federalism means that states and EPA as co-regulators have a shared commitment to work together to protect human health and the environment ...

The “shared commitment” is not well-defined, but the Policy touts EPA’s oversight obligations, its commitment to effective communication, and authority to independently enforce environmental and civil rights laws. On this last point, the Policy is redefined to incorporate the Biden Administration’s focus on environmental justice, referencing “disproportionate” impacts to “historically marginalized, underserved, and overburdened” communities.

Notwithstanding this shared commitment, the new policy makes clear that EPA seeks to assume a more dominant role in regulatory decision-making. Notably, the new policy was not issued for public comment, unlike the prior guidance. As such, EPA appears more focused on defining policy for the regulated community, rather than listening to what the regulated community has to say.

New National Enforcement and Compliance Initiatives

At the beginning of the year, EPA announced several proposed national compliance and enforcement initiatives, specifically: (1) emissions of hazardous air pollutants; (2) accidental releases at industrial and chemical facilities; (2) NPDES enforcement; and (4) drinking water standards enforcement at community water systems. EPA also retained initiatives relating to toxic air emissions from hazardous waste facilities and aftermarket “defeat devices” for vehicles and engines.

Public comments were received through March 13 and EPA also sought comment on other potential initiatives relating to climate change, PFAS, lead exposure and coal combustion residuals. Notwithstanding PFAS not being a currently-proposed compliance initiative, EPA’s recent PFAS-related enforcement against a major chemical manufacturer highlights that even its potential initiatives are not merely hypothetical and reflect clear priorities that the agency will be aggressively pursuing into the future.

Civil Penalty Increases

On a final note, earlier this year EPA announced its annual inflationary increases to its civil penalty structure, which continued to increase the statutory civil penalties for violations in accordance with the Consumer Price Index. For example, increases to major federal environmental statutes include: TSCA (Sec. 16(a)(1)) –\$46,989 (previously \$43,611); Clean Water Act (Sec. 309(d)) – \$ 64,618 (previously \$59,973); Clean Air Act (Sec. 113(b)) – \$117,468 (previously \$109,024); and CERCLA (Sec. 106(b)(1)) – \$67,544 (previously \$62,689), among others.

For more information, please feel free to contact any of Roetzel’s EHS professionals.

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