

THE JOURNAL OF FEDERAL AGENCY ACTION

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Trump Administration Takes Aim at Regulatory Overcriminalization

Michael E. Clark, Joe D. Whitley, Jacob Edwards, and
Matthew L. Hickman*

In this article, the authors examine President Trump's executive order entitled, "Fighting Overcriminalization in Federal Regulations."

On May 9, 2025, President Donald Trump issued an executive order titled "Fighting Overcriminalization in Federal Regulations"¹ (the Order). The Order takes aim at what the Trump calls "regulatory crimes," with the intended purpose of easing the "regulatory burden on everyday Americans" and to "ensure no American is transformed into a criminal for violating a regulation they have no reason to know exists." The Order marks another step taken by the Trump administration to deregulate various industries and sectors of the economy.

Over the years, federal agencies have promulgated a vast number of regulations, many of which carry civil monetary penalties or even criminal punishments. While the exact number is unknown, despite concerted efforts to find out, reasonable estimates of the total number of regulations that carry criminal penalties are upward of 300,000, with the Federal Register now spanning over 175,000 pages. As a result, it is impossible for an ordinary person to know and be aware of every regulatory crime related to their industry and beyond.²

The Order recognizes this problem and seeks to clear the muddy waters of federal regulations as follows:

1. *Prosecution of Criminal Regulatory Offenses Is Disfavored.*
The Order makes it the official policy of the United States that criminal enforcement of "criminal regulatory offenses" in general is "disfavored." The Order states that if criminal regulatory offenses are to still be prosecuted, it is "most appropriate" for individuals and companies "who know or

can be presumed to know what is prohibited or required by the regulation and willingly choose not to comply.”

2. *Prosecution of Strict Liability Regulatory Offenses Specifically Is Disfavored.* In addition to disfavoring prosecuting criminal regulatory offenses, the Order specifically addressed regulatory offenses that attach strict liability. Strict liability exists when a defendant is liable for committing an action regardless of intent or mental state when committing the action. Most federal crimes, and in particular, white-collar crimes, require the government to prove mental culpability (called *mens rea*), whether it involves acting willfully, knowingly, purposefully, recklessly, or with negligence. Strict liability offenses require none of the above. As such, a person or entity can be criminally charged with violating a regulation they did not know, and had no reason to know, existed. The Order calls for prosecutors to resolve strict liability regulatory offenses through civil penalties, not criminal prosecution.
3. *Better Transparency.* Within one year of the date of the Order, each executive agency must publish a list of regulatory criminal offenses over which it has enforcement responsibilities and make the same available to the public on its web page. For each offense on the list, the agency must include any potential criminal penalties for violations and the applicable *mens rea* standard. Any criminal enforcement of regulatory offenses that are not listed is “strongly discouraged.” Moving forward, any proposed regulations that might carry criminal penalties “should explicitly describe the conduct subject to criminal enforcement, the authorizing statutes, and the *mens rea* standard applicable to those offenses.”
4. *Default Mens Rea Requirement.* The Order directs the head of each executive agency to coordinate with the Attorney General to determine whether there is authority to adopt a “default” *mens rea* standard for criminal regulatory offenses that do not state a *mens rea* standard. In addition, agency heads are instructed to examine whether existing *mens rea* standards are authorized by statute and, if not, present a plan for changing the current standards to a generally applicable standard. This marks an effort by the Trump

administration to consolidate varying levels of scienter requirements into a more uniform standard.³

5. *Clear Guidance for Criminal Referrals to the Department of Justice.* The Order requires each executive agency to publish guidance in the Federal Register on its process for deciding whether to make a criminal referral to the Department of Justice for violations of federal regulations. The guidance should include factors such as:
 - 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.
6. *Exclusions.* The Order explicitly excludes immigration enforcement and national security functions from its provisions. This is consistent with previous executive orders by Trump regarding deregulation.⁴

Key Takeaways

Watch for Additional Agency-Level Information

As discussed above, within a year, executive agencies will be required to create a list of their regulations that carry criminal penalties. These lists will serve as valuable resources for those seeking to navigate affected industries.

Impact on Highly Regulated Industries

Those who operate in highly regulated industries are often presumed to have knowledge of the statutes and regulations that govern that industry. Because the Order maintains that prosecution of criminal regulatory offenses is most appropriate in cases where the defendants know or are presumed to know the law, it

will likely have a more limited impact on those operating in highly regulated industries.

Impact on Existing Doctrines

The Order may weaken enforcement of regulations under the *Park* Doctrine (also called the Responsible Corporate Officer Doctrine). The *Park* Doctrine allows for criminal liability to be imposed on “responsible corporate officers” for violations of law and regulations committed by corporations. Because the Doctrine allows for liability even without proof of the specific officer knowing of the violation, these violations are effectively treated as strict liability offenses. The theory is that such executives are in a position to prevent the public from being harmed and their failure to do so is sufficient to warrant prosecution.

More Opportunities for Settlement/Alternative Resolution

Given that prosecution of regulatory crimes is now disfavored, alleged offenders may now have greater leverage to reach alternative resolutions and avoid prosecution. For example, there may now be more opportunities to avoid criminal prosecution through negotiating non-prosecution agreements, deferred prosecution agreements, or favorable civil settlements.

However, targets of regulatory enforcement actions should continue to be on alert for alternative regulatory enforcement mechanisms available to some executive agencies. For example, the Department of Health and Human Services, Office of the Inspector General, may exclude practitioners from federal healthcare programs for a litany of reasons, and while exclusion is severe, it is not considered a criminal punishment for a regulatory offense under the Order.

Notes

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1. <https://www.whitehouse.gov/presidential-actions/2025/05/fighting-overcriminalization-in-federal-regulations/>.

2. For an example of how this affects an ordinary person, see Mike Fox, *The Vindictive Prosecution of a Champion Runner*, Cato Institute (Mar. 17, 2025), <https://www.cato.org/commentary/vindictive-prosecution-champion-runner/>. See also Jacob Sullum, *The Federal Government's 175,000 Pages of Regulations Turn the Rule of Law into a Cruel Joke*, Reason Magazine (May 14, 2025), <https://reason.com/2025/05/14/the-proliferation-of-regulatory-crimes-turns-the-rule-of-law-into-a-cruel-joke/>.

3. *Scienter* requirements for criminal offenses have been subject to different interpretations. For example, in *Ruan v. United States*, 597 U.S. 450 (2022), the Supreme Court narrowly interpreted what constituted a “knowing” violation of the Controlled Substances Act (CSA). The CSA prohibits a provider from “knowingly or intentionally” manufacturing, distributing, or dispensing a controlled substance, “except as authorized” by law. In interpreting this provision, the Court deviated from its past interpretation of the “knowingly” *mens rea* standard, finding that not only must a provider knowingly manufacture, distribute, or dispense a controlled substance, the provider must also know that doing so was beyond the boundary of their legal authorization. This is just one example of how unclear statutory and regulatory *scienter* requirements can lead to confusion upon application.

4. See Exec. Order No. 14,219, 90 C.F.R. 10583.