EPA'S NEW STRATEGIC CIVIL-CRIMINAL ENFORCEMENT POLICY: WILL ENHANCED COORDINATION LEAD TO MORE CRIMINAL ENFORCEMENT?

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On 17 April 2024, the US Environmental Protection Agency (EPA) issued a new Strategic Civil-Criminal Enforcement Policy designed to improve collaboration between its civil and criminal enforcement offices, with the goal of promoting "optimal enforcement." The Policy was issued by EPA's Assistant Administrator for the Office Enforcement and Compliance Assurance (OECA), David M. Uhlmann, and follows his recent remarks at the American Law Institute's annual Environmental Law Conference, where he highlighted the need to improve consistency and fairness through collaboration in civil and criminal enforcement. The Policy, which is directed to EPA enforcement personnel across the nation, includes several measures designed to do just that. As a result of this increased internal collaboration at EPA, regulated entities may see faster case resolutions but may also see greater strategic use of criminal tools to advance EPA's national enforcement priorities.

BACKGROUND

As the Unites States' primary federal environmental regulator, EPA has a variety of enforcement tools at its discretion under the nation's environmental laws, including the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act. Those enforcement tools include administrative orders and fines, civil enforcement actions, and—most ominously—criminal penalties, which can involve both monetary sanctions and imprisonment. While criminal prosecution is typically reserved for cases in which the defendant—which can be a company, an individual, or both—exhibits the requisite degree of mental culpability (e.g., knowing, reckless, or in some instances even negligent violations), it is initially a matter of EPA's discretion to decide which of the enforcement tools to exercise. (Of course, as it relates to initiating civil and criminal litigation, EPA's discretion is subject to a final determination by the US Department of Justice.) EPA also has the option of pursuing both civil and criminal enforcement in parallel if, based on case-specific factors, EPA decides that one type of penalty is not sufficient to punish the alleged violator and deter wrongful conduct.

Parallel proceedings are often seen as an important aspect of the federal government's efforts to obtain complete accountability—particularly in the white collar context, where information-sharing between agency components can speed up investigations and result in more comprehensive settlements. While parallel proceedings can certainly maximize the effectiveness of the government's enforcement efforts, they also create the potential for heightened risk to the constitutional and other procedural rights of those being investigated. The courts have recognized such risks, cautioning that the government cannot bring civil actions solely to obtain evidence for

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criminal prosecution; cannot use evidence against a defendant in a criminal case which has been coerced under penalty; and cannot mislead a subject about the possibility that information obtained could be used in a criminal case. Given these risks, criminal and civil enforcement personnel must perform a delicate dance when sharing and utilizing information in parallel proceedings.[1]

THE NEW STRATEGIC CIVIL-CRIMINAL ENFORCEMENT POLICY

EPA's new Policy seeks to provide EPA enforcement personnel with clearer guidelines regarding the use of their various enforcement tools. The Policy mandates four measures to increase coordination between its civil and criminal enforcement programs.

Increased Collaboration in the Strategic Planning Process

First, the Policy requires EPA's civil and criminal enforcement programs to collaborate in the development and implementation of EPA's national and regional enforcement priorities. This includes enhanced civil-criminal coordination with respect to EPA's National Environmental Compliance Initiatives, PFAS Roadmap, and Lead Action Plan. As it relates to enforcement actions generally, the Policy envisions that increased collaboration at the strategic-planning level will "lead to improved case selection," and "ensure the optimal use of existing resources for maximizing deterrence and promoting future compliance."

Regular Consultation Throughout the Enforcement Process

Second, the new Policy requires regular consultation between EPA civil and criminal enforcement managers throughout the lifecycle of the enforcement process, including convening regular meetings (at least monthly).

One principal purpose of these regular meetings will be to ensure that EPA civil and criminal enforcement personnel will consult with each other during case screenings to decide which cases will be investigated criminally, which will be referred for civil enforcement, and which will be handled as administrative matters. To assist EPA staff in making screening decisions, the Policy includes an appendix listing factors to consider, including the significance of the violations, the type of culpability involved, the compliance history for the alleged violator, the sophistication of the violator, and the alignment of the offense with any national or regional strategic priority. In each case, the appendix lists sub-factors which militate in favor of criminal enforcement, including willful or knowing conduct, possibility of imminent and substantial endangerment, and a history of repeated violations. Notably, the Policy explains that a civil matter yielding evidence of falsification of data, concealment of evidence, or other deceptive or misleading conduct warrants criminal review, as does chronic non-compliance or facilities with continued violations despite prior enforcement efforts.

After the initial case screening, the Policy requires civil and criminal enforcement offices to continue coordinating throughout the life of the enforcement action—this ongoing coordination is to occur not only when there are parallel proceedings but also during criminal-only and civil-only matters, to discuss developments that may indicate the need for action by the other program. The Policy states as a goal that most judicial cases be filed, charged, or concluded within two to three years, and administrative matters concluded within 12 to 18 months.

Tracking and Sharing Information

Third, the Policy requires EPA's civil and criminal enforcement divisions to track and share non-criminally sensitive case information during the pendency of an enforcement proceeding—from initial case screening until

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the case is resolved. To aid this effort, EPA will be developing a national case tracking system as part of EPAs ongoing data management modernization efforts.

Employee Training

Finally, the Policy requires EPA offices to conduct training to ensure the Policy is implemented correctly. These trainings will include best practices for collaboration, procedures for screening and tracking cases, and instruction on factors that warrant civil or criminal enforcement.

KEY TAKEAWAYS

Increased Information Sharing Between Civil and Criminal Offices

The Policy creates increased opportunities for EPA to use certain information gathered during civil enforcement proceedings to support subsequent criminal enforcement or to use evidence gathered as part of a criminal investigation to further a civil case. The Policy establishes guardrails to protect against improper uses, including: noting legal restrictions on using civil enforcement tools to gather evidence for a criminal case; reiterating Rule 6(e) obligations (to maintain confidentiality of “grand jury” materials); and providing training so that staff understand what criminal enforcement personnel “can and cannot share with their civil enforcement counterparts.” Still, given the enhanced lines of communication between offices and the regularized exchange of case updates and evidence, regulators will need to be vigilant to ensure that formal guardrails do not devolve in practice.

Increased Focus on Criminal Enforcement for Key Agency Priorities

The new Policy demonstrates a potential narrowing of the difference between civil and criminal enforcement and could result in more frequent and more aggressive use of EPA's criminal enforcement tools, as EPA looks to the most efficient use of its resources for “maximizing deterrence” and “promoting future compliance.” The Policy could also lead to more criminal enforcement matters in environmental justice communities, as environmental justice remains an overarching national strategic priority for EPA and is integrated into each of EPA's programmatic enforcement priorities.

Swifter Case Resolutions

The Policy's focus on efficient, coordinated resolution of EPA enforcement matters could result in increased certainty and predictability for entities that find themselves the subject of EPA enforcement actions. Under the new Policy, the EPA's goal is to have a clear internal direction about how it will handle a case within a year of its initial case screening, speeding up the time for ultimate resolution.

Early Consultation Will Be Crucial

As EPA strengthens its internal criminal-civil pathways, regulated entities will be wise to do the same. Regardless of whether an environmental investigation is initiated from a civil or criminal enforcement office, it will now be even more important to consult with counsel experienced in both practices. Corporate compliance and legal officers should obtain early and frequent case assessments by those who have a full appreciation for whether a case will ultimately be pursued civilly or criminally and know how to manage an investigation and enforcement response with both possibilities in mind.

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FOOTNOTES

[1] For other K&L Gates Client Alerts discussing civil and criminal enforcement by DOJ, see DOJ Revises Corporate Compliance Guidance Calling Attention to Three Areas Where Most Companies Fall Short: Risk Assessments, Compliance Culture, and Continuous Compliance Program Improvement; EPA Administrator Moves to End "Sue and Settle"; Upping the Ante: DOJ Prosecuting OSHA Cases as Environmental Crimes; and more of K&L Gates' latest thinking.

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