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COMPLIANCE

Readying for an Environmental Reg Rollback

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AS WE APPROACH THE TWO-MONTH mark of the Trump administration, early actions suggest that the president intends to walk back much of the environmental regulation and oversight of his predecessors.

He has already forbidden his agencies from issuing new regulations without commensurate offsets; condemned greenhouse gas regulations under the Clean Power Plan; and committed to review and revoke the controversial "Waters of the US" rule that consolidated federal regulatory authority by expanding the definition of "wetlands."

Both the president and Environmental Protection Agency Administrator Scott Pruitt expect to halt, if not unwind, regulatory and enforcement burdens in the environmental arena.

While waiting to see how this plays out, GCs and compliance officers have opportunities for reducing compliance burdens now, based on Obama administration changes to EPA enforcement policies that President Trump likely will keep, if not expand.

These changes offer user-friendly incentives to disclose and correct non-compliance early and often, without fear of punishing fines or penalties.

Both Democratic and Republican administrations have supported the use of self-audit and disclosure policies to encourage voluntary detection, disclosure, correction, and prevention of environmental violations.

Environmental law presents an alphabet soup of environmental requirements, each exposing a company to potentially crippling sanctions and penalties for what can be relatively minor violations.

Administrative penalties range from notices of violations, stop sale, use and removal orders for products, tight timeframes for a return to compliance, and monetary fines and penalties.

Beyond lie civil monetary penalties and, in extreme cases, criminal penalties and/or imprisonment where the conduct is knowing or willful.

A hospital or health care facility, for example, could be regulated under the Clean Air Act, the Clean Water Act, the Emergency Preparedness and Community Right to Know Act

and the Resource Conservation and Recovery Act (RCRA), among other acts.

One common hospital violation is the failure to report the use, storage, or release of hazardous substances at the facilities, a common requirement under EPCRA.

Many of these statutes authorize civil penalties of up to $37,500 per violation per day, and multi-day "continuing violations" can quickly trigger staggering levels of liability on paper.

Penalties are set based on the gravity of the violation—for instance, the nature, extent, and risk of the violation— and any economic benefit the violator may have gained, in terms of avoided compliance costs or increased sales.

The EPA will also consider the culpability of the violator, any prior history of violations and the violator's ability to pay and/or stay in business.

While these policies are designed to calibrate federal penalties to the severity and economic value of a violation, the continued risk of inadvertent violation and enforcement imposes both financial and legal uncertainty on facilities already juggling dozens of other regulatory obligations.

In 2000, the EPA established a voluntary audit policy to manage the magnitude of this risk. Under the policy, the agency will remove anywhere from 75 percent to 100 percent of the gravity-based element of a civil penalty and forego criminal prosecution where the violator has taken steps to identify, disclose, resolve, and prevent violations.

While this policy was an important step forward for the regulated community, it could be cumbersome. In December 2015, the Obama administration established the "e-Disclosure" portal to make the self-disclosure process more straightforward, more efficient, and less time and resource intensive for regulated entities and EPA.

The portal allows companies to voluntary report online, and, in certain, limited cases, quickly resolve routine violations with little or no penalty.

Filers reporting recordkeeping violations, like the hypothetical health care facility above, may receive an automatic and instantaneous electronic Notice of Determination confirming no penalty will be assessed.

For other more significant or unresolved violations, filers currently receive an automatic acknowledgment and a commitment that EPA will consider penalty mitigation before taking an enforcement action.

It is this latter area that Trump may want to expand, and general counsels should consider approaching the agency to do so. Expansion of the penalty waiver for disclosure of pharmaceutical waste violations, for example, would be a timely fix to a long-time regulatory problem under RCRA, a statute poorly suited to managing pharmaceutical waste streams.

Given the Trump administration's commitment to regulatory reform, and the similar sentiments from the leadership in the Congress, industry stakeholders have a unique opportunity to shape future enforcement policies.

In the end, the voluntary audit and eDisclosure modifications put in place by Obama fit neatly within the environmental regulatory system taking shape under Trump. If companies were reluctant to report before, they should feel emboldened to take advantage of these important compliance incentives, and may benefit further as these incentives are poised to expand.

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