POLICY PRIMER

Administrative Overcriminalization

Council to Modernize Governance | November 2026

I. Introduction

This country is made up of laws. Our founders created a system of checks and balances to ensure that those laws are properly created. And, much care is given to any law that deprives people of their liberty. The doctrine of *habeas corpus* was enshrined in the Constitution even before the Bill of Rights.

People might be shocked to know that, despite these protections, many criminal laws are created by bureaucrats sitting in executive agencies. Congress does not participate in that process for some, while for others it merely grants broad authority to the agencies to do what they wish. The agencies promulgate regulations, most of which are unknown to the average citizen. To make matters worse, many of these regulations do not even require a *mens rea* (culpable mental state), meaning citizens can violate those laws without even intending to.

On May 24, 2024, the Council to Modernize Governance (CMG) published a report making a number of suggestions for how federal agencies can cut back on the mass of regulations with criminal penalties—namely, imprisonment—over the past century. [1]

These recommendations included:

1. The Attorney General should create a list of all criminal offenses promulgated by statute, the respective potential penalties, mens rea, and number of prosecutions by the DOJ during the prior 15 years;

2. Agencies should report on any criminal regulation within their purview, the relevant penalties, any applicable mens rea, and the number of referrals to the DOJ during the prior 15 years under said regulations;

3. Congress should set a default mens rea of willfulness for all non-jurisdictional elements of criminal regulatory offenses;

4. Agencies should specify the mens rea of each element of a criminal regulatory offense; and

5. Congress should specify that agency regulations implementing “ambiguous” criminal statutes do not receive deference.

II. Executive Order 14294 Largely Mirrors CMG’s May 24, 2024, Report

On May 9, 2025, President Donald J. Trump signed Executive Order 14294, “Fighting Overcriminalization in Federal Regulations.” This Executive Order largely mirrors CMG’s proposal.

Specifically, the Executive Order adopts CMG’s suggestions that agencies be required to: (1) submit a report of all criminal regulatory offenses within their purview; (2) independently publish their reports; (3) disfavor criminal referrals for regulations not part of their reports; (4) ensure future regulations provide real notice to Americans of *what* is being regulated; and (5) publish guidelines on how agencies plan to enforce criminal regulations.

[1] Gary Lawkowski, J.D. & Curtis M. Schube, J.D., “Fighting Federal Overcriminalization,” *Council to Modernize Governance*, May 24, 2024, https://www.modernizegovernance.org/fighting-federal-overcriminalization/.

III. Agencies have Responded to the Executive Order with Decisive Action

Many cabinet-level or highly impactful agencies with criminal regulations took immediate action, pursuant to Executive Order 14294.

The DOJ, on November 21, 2025, issued guidance to agencies to help them determine what constitutes a "criminal regulatory offense" for purposes of the Executive Order. The DOJ then circulated a model spreadsheet with accompanying instructions to standardize the reports and facilitate the OMB's review. On April 28, 2026, the DOJ issued to OMB a report and attached appendix identifying 62 criminal regulatory offenses under DOJ's administrative control.[2]

In a little over a month, the EPA [3] and the Departments of Commerce, [4] Energy, [5] HHS, [6] Homeland Security, [7] Interior, [8] Labor, [9] Transportation, [10] Treasury, [11] Veterans Affairs, [12] and War [13] promulgated a notice in the *Federal Register* stating that their criminal regulatory evaluations would include intent and that, for these regulatory criminal offenses, the agencies would attempt to divert enforcement toward civil and administrative consequences, as opposed to criminal referrals to the Department of Justice.

The Departments of Education, [14] HHS, [15] CFPB, [16] the SEC, [17] and the OCC [18] additionally promulgated a notice in the *Federal Register* identifying all criminal regulations within their purview. Additionally, the EPA, on May 8, 2026, submitted to OMB a 13-page report categorizing its regulations carrying criminal penalties. [19]

The Department of Commerce on August 4, 2025, issued a notice in the *Federal Register* that it would promulgate final rules creating criminal regulatory offenses only as consistent with the Executive Order going forward. [20] On August 21, 2026, it issued a final rule in the *Federal Register* removing a criminal regulatory offense (15 C.F.R. § 265.1(b)) from its regulations pursuant to the Executive Order. [21]

Treasury's Office of Foreign Assets Control, on September 25, 2026, promulgated a final rule in the *Federal Register* adding mens rea requirements to both existing and new Treasury regulations, including those promulgated pursuant to IEEPA. [22]

FERC, on June 16, 2025, issued a notice in the *Federal Register* stating that pursuant to the Executive Order it would consider "the seriousness of the violation; evidence of willful behavior; and the strength of the evidence of wrongdoing" before making criminal referrals. [23]

The Federal Maritime Commission, on June 20, 2025, issued a notice in the *Federal Register* affirming that "[n]one of the statutes or regulations that the Federal Maritime Commission administers carry criminal penalties for violations." [24]

[2] Department of Justice, "Department of Justice Report: Criminal Regulatory Offenses," April 28, 2026, https://www.justice.gov/olp/select-publications-and-reports.
[3] 90 Fed. Reg. 36,044 (2025).
[4] 90 Fed. Reg. 27,526 (2025).
[5] Department of Energy, "Guidance on Referrals for Potential Criminal Enforcement," June 23, 2025, https://www.energy.gov/sites/default/files/2025-06/Guidance_on_Referrals_for_Potential_Criminal_Enforcement.pdf; 90 Fed. Reg. 26,802 (2025).
[6] 90 Fed. Reg. 26,822 (2025).
[7] 90 Fed. Reg. 26,062 (2025).
[8] 90 Fed. Reg. 27,050 (2025).
[9] 90 Fed. Reg. 27,057 (2025).
[10] 90 Fed. Reg. 27,386 (2025).
[11] 90 Fed. Reg. 29,628 (2025).
[12] 90 Fed. Reg. 36,095 (2025).
[13] 90 Fed. Reg. 31,987 (2025).
[14] Department of Education, "Fighting Overcriminalization in Federal Regulation: Report on Criminal Regulatory Offenses," May 8, 2026, https://www.ed.gov/about/ed-overview/required-notices/fighting-overcriminalization-federal-regulation-report-criminal-regulatory-offenses.
[15] U.S. Department of Health and Human Services, "HHS Review of Criminal Regulatory Offenses," May 15, 2026, https://www.hhs.gov/regulations/criminal-regulatory-offenses.html.
[16] Consumer Financial Protection Bureau, "Executive Order 14294 Report: Criminal Regulatory Offenses," May 8, 2026, https://www.consumerfinance.gov/data-research/research-reports/executive-order-14294-report-criminal-regulatory-offenses/.
[17] U.S. Securities and Exchange Commission, "Report Pursuant to Section 4 of Executive Order 14294, 'Fighting Overcriminalization in Federal Regulations,'" May 8, 2026, https://www.sec.gov/about/reports-publications/report-pursuant-section-4-executive-order-14294-fighting-overcriminalization-federal-regulations.
[18] Office of the Comptroller of the Currency, "OCC Report on Criminal Regulatory Offenses," May 8, 2026, https://www.occ.gov/news-issuances/news-releases/2026/nr-occ-2026-36.html.
[19] U.S. Environmental Protection Agency, "U.S. Environmental Protection Agency Report on Criminal Regulatory Offenses Required by Executive Order 14294, 'Fighting Overcriminalization in Federal Regulations,'" May 8, 2026, https://www.epa.gov/system/files?file=documents/2026-05/eo-14294-report-crim-reg-offenses-with-cover-page-5-8-26_0.pdf. The EPA report expansively covers criminal regulations promulgated pursuant to The American Innovation and Manufacturing Act; The Clean Air Act; The Comprehensive Environmental Response, Compensation, and Liability Act; The Clean Water Act; The Marine Protection, Research, and Sanctuaries Act; The Emergency Planning and Community Right-to-Know Act; The Federal Insecticide, Fungicide, and Rodenticide Act; The Noise Control Act; The Resource Conservation and Recovery Act; The Safe Drinking Water Act; and The Toxic Substances Control Act.
[20] 90 Fed. Reg. 36,425 (2025).
[21] 91 Fed. Reg. 54,214 (2026).
[22] 91 Fed. Reg. 60,821 (2026).
[23] 90 Fed. Reg. 26,285 (2025).
[24] 90 Fed. Reg. 26,292 (2025).

IV. We Continue to Provide Guidance to Agencies

To this day, CMG continues to pilot initiatives aimed at restoring governance to Americans—not bureaucrats. Specifically, it has reviewed the regulations of two agencies and has identified problematic criminal regulations for them to address.

a. Our Guidance to the Department of the Interior

CMG reviewed the regulations under the jurisdiction of the Department of the Interior specifically to identify those lacking a mens rea or where Congress had not properly delegated criminal authority to the agency. It identified examples falling under both categories, as well as a few other problematic criminal regulations. Specifically, CMG identified regulations under the following categories: (1) with no mens rea; (2) with no mens rea in part; (3) where the enabling authority did not delegate agency authority at all; (4) a combination of categories (1) and (3); (5) where the enabling authority was repealed; (6) criminal regulations effectuated only by civil judgment; and (7) where the Department of the Interior promulgated criminal regulations in excess of its delegated authority.

Category (5) reveals yet another problem with agencies promulgating criminal regulations—they create crimes but never delete them. For example, 25 C.F.R. § 140.5 prohibits agency employees from contracting or trading with "Indians." Yet the statute from which that crime is derived was repealed—20 years ago.

Category (6) identifies a complete bypassing of criminal-law protections for the accused. As an example, 43 C.F.R. § 3163.3 provided that someone who received only a civil penalty under the Federal Oil and Gas Royalty Management Act shall, "upon conviction, be punished by a fine of not more than $50,000, or by imprisonment for not more than 2 years, or both." This means that criminal penalties could happen without ever satisfying the beyond a reasonable doubt standard.

b. Our Guidance to the Department of Agriculture

CMG did the same analysis for the Department of Agriculture. In that report, CMG identified multiple criminal regulations threatening imprisonment without a mens rea requirement. CMG was able to identify criminal regulations that do not have a mens rea and at least one that was in excess of the agency's delegated authority.

V. Conclusion

CMG is pleased that the Trump administration implemented many of the policy goals proposed by CMG in an Executive Order that has largely been complied with by the federal agencies.

The work is not done, however. Agencies should work to formally identify these regulations if they have not done so already, much like CMG did for the Department of the Interior and the Department of Agriculture. Further, the agencies should repeal or amend their problematic criminal regulations.