Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents [Issued: October 9, 2019] (“Guidance Executive Order”)


Summary of Guidance Executive Order

Executive Department(s)/Agencies: Includes Department of Treasury and Department of Labor

The Guidance Executive Order appears aimed at curtailing executive departments/agencies from adopting legally binding requirements when the ability for doing so is (generally) vested in Congress’s legislative authority. “The Administrative Procedure Act (APA) generally requires agencies, in exercising that solemn responsibility, to engage in notice-and-comment rulemaking to provide public notice of proposed regulations under section 553 of title 5, United States Code, allow interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the Federal Register.” Agency issued guidance that circumvents these steps does not have the appropriate process to regulate activity.

As such, the Guidance Executive Order provides that “agencies may clarify existing obligations through non binding guidance documents, which the APA exempts from notice-and-comment requirements” but may not ultimately “regulate the public without following the rulemaking procedures of the APA.” Further concern is expressed when non-binding guidance carries an “implicit threat” of regulatory authority/enforcement. Agency actions – in many instances – are being held as applicable legal standards, without appropriate ability for the public to comment on or question the issued authority.

Based on these findings, the Guidance Executive Order expresses the policy of the executive branch to “require that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public. Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.”

Agency Requirement to Identify Guidance Documents: Within 120 days of the date on which the Office of Management and Budget issues an implementing memorandum (“Implementation Date”), each agency shall:

- Provide a searchable, indexed database identifying all guidance documents. Such documents will be identified as lacking the force and effect of law except to the extent such guidance meets the exceptions articulated in the Guidance Executive Order.
Review its guidance documents and, consistent with applicable law, rescind those guidance documents that it determines should no longer be in effect.

Finalize Regulations: Within 300 days of the Implementation Date, an agency shall finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents. Regulations shall be issued/finalized in accordance with the appropriate rules and requirements, including a period of public notice and comment.

Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication [Issued: October 9, 2019] (“Enforcement Executive Order”)


Summary of Enforcement Executive Order

Executive Department(s)/Agencies: Includes Department of Treasury and Department of Labor

The Enforcement Executive Order is targeted to ensuring that parties/the public are aware of the rules under which they/it are being governed. “Regulated parties must know in advance the rules by which the Federal Government will judge their actions. The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., was enacted to provide that “administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations. Morton v. Ruiz, 415 U.S. 199, 232 (1974).” The Enforcement Executive Order further cites the Freedom of Information Act which provides a prohibition from an agency adversely acting pursuant to an unpublished (under the Federal Register) rule or policy.

The Enforcement Executive Order attempts to level set agency action and require transparency and fairness. In an effort to promote such:

- A violation of law must be established by applying statute or regulation. An “agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations.” A guidance document that is being used to govern action must simply articulate understanding of the applicability of a statute or regulation to a particular set of circumstances. Such guidance document should not expand the reach of the statute or regulation. Further the public must be “on notice” of the existence of such guidance, through appropriate publication in the Federal Register or through a searchable index of guidance on the agency’s website.
• The Enforcement Executive Order continues by noting that agency action should not result in “unfair surprise.” Defined as: a lack of reasonable certainty or fair warning of what a legal standard administered by an agency requires. The meaning of this term should be informed by the examples of lack of fair notice discussed by the Supreme Court in Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 & n.15 (2012). Such standard applies not only when the agency imposes penalties but also when it indicates that past conduct has violated the law.

• Finally, an agency must provide notice of decisions in publication prior to the conduct over which jurisdiction sought occurs. Importantly – actions established via court activity may be sufficient to provide guidance. However, if “an agency intends to rely on a document arising out of litigation (other than a published opinion of an adjudicator), such as a brief, a consent decree, or a settlement agreement, to establish jurisdiction in future administrative enforcement actions or adjudications involving persons who were not parties to the litigation, it must publish that document, either in full or by citation if publicly available, in the Federal Register (or on the portion of the agency’s website that contains a single, searchable, indexed database of all guidance documents in effect) and provide an explanation of its jurisdictional implications.”

Opportunity to Contest: The Enforcement Executive Order requires that an agency provide a party over which it seeks jurisdiction an opportunity to be heard regarding the agency’s legal and factual determination. This includes instances where the agency will issue a “no-action letter.”

Gathering Information: Collection of information should occur in compliance with the provisions of the Paperwork Reduction Act, section 3512 of title 44, United States Code, and section 1320.6(a) of title 5, Code of Federal Regulations, applicable to collections of information (other than those excepted under section 3518 of title 44, United States Code).

***************

Outstanding “Guidance” That May be Impacted:

• Proposed Labor Regulation 3(18) defining “adequate consideration” [held in proposed state for more than 30 years]
• Imposition of party specific “Fiduciary Process Agreements” (some of which are conflicting) on non-party fiduciaries
• Department of Treasury: December 13, 2019 Office of Chief Counsel Memorandum Regarding Price Protection
• Repetitive Subpoenas/requests for information/overly broad requests for information
• No-action letters citing broad assertions of breaches of fiduciary duty(ies) without ability to respond/be heard
• Actions taken without review/interview of all necessary parties
Miscellaneous Audit/Investigation Activity

- IRS Audit of 2017 Form 5500s
  - Challenges if 2017 is a transaction year
  - Discussion of Interview Questions
  - Information Request Example
- Department of Labor – Assertion that a “distribution fee” is not an appropriate plan expense. Plan participants cannot be charged to “process benefits.”
- DOL Cybersecurity Audits