

Leaning into Fairness

EXECUTIVE ORDER ON ENFORCEMENT

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Introduction



Enforcement Executive Order

- President Trump has signed two significant executive orders regarding transparency in federal agency guidance and enforcement:
 - An [executive order](#) on promoting the rule of law through improved agency guidance documents (**Guidance Executive Order**).
 - An [executive order](#) on promoting the rule of law through transparency and fairness in the use of agency guidance in civil administrative enforcement and adjudication (**Enforcement Executive Order**).
- This visual memorandum, which focuses on the Enforcement Executive Order, is one of two public memoranda that explain the Guidance and Enforcement Executive Orders.
- Our visual memorandum on the **Guidance Executive Order** is available [here](#).

Key Takeaways

- The Enforcement Executive Order requires agencies to provide safeguards that go beyond the requirements of the **Due Process Clause** of the Constitution to provide regulated parties with **fairness and transparency** when taking enforcement action.
- Several key provisions of the Enforcement Executive Order apply to agency actions that have a **legal consequence**, a category much broader than what is typically understood to be enforcement action or adjudication.
- The Enforcement Executive Order:
 - Requires agencies to provide **fair notice** before taking any **administrative enforcement action**, engaging in **adjudication**, or otherwise making a determination that has a **legal consequence** for a regulated party;
 - Prohibits enforcement that applies standards of conduct in a way that would result in **unfair surprise**; and
 - Limits the ability of agencies to rely solely on **guidance documents** when taking enforcement action.

Key Takeaways

- The Enforcement Executive Order also aims to:
 - Foster **cooperative information sharing** by:
 - Providing incentives to regulated parties for voluntarily self-reporting regulatory violations;
 - Encouraging voluntary information sharing by regulated parties; and
 - Providing pre-enforcement rulings to regulated parties.
 - Establish **predictable outcomes** for regulated parties.
- Unlike the Guidance Executive Order, most of these requirements are immediate and self-implementing.
- Criminal investigations and civil enforcement actions by the DOJ are excluded from the requirements of the Enforcement Executive Order.
- Unlike the Guidance Executive Order, which specifically excludes **independent agencies**, the Enforcement Executive Order may apply more broadly to both executive agencies and independent agencies.

Underlying Principles, Key Definitions, and Scope



Underlying Principles

- The Enforcement Executive Order has as its underlying principle that in a constitutional democracy and under the rule of law, agencies should be **fair and transparent** when taking **enforcement actions** against regulated parties.
- It requires agencies to provide regulated parties with procedural **safeguards** beyond those required by the Due Process Clause of the Fifth Amendment of the Constitution.

“Agencies shall act **transparently and fairly** with respect to all affected parties, as outlined in this order, when engaged in **civil administrative enforcement or adjudication**. No person should be subjected to a civil administrative enforcement action or adjudication absent prior **public notice** of both the enforcing agency’s jurisdiction over particular conduct and the legal standards applicable to that conduct. Moreover, the Federal Government should, where feasible, foster greater **private-sector cooperation** in enforcement, promote **information sharing** with the private sector, and establish **predictable outcomes** for private conduct. Agencies **shall afford regulated parties the safeguards described in this order**, above and beyond those that the courts have interpreted the **Due Process Clause** of the **Fifth Amendment** to the Constitution to impose.”

– Enforcement Executive Order, Section 1

Key Definitions

- The Enforcement Executive Order clarifies and expands upon the principles of transparency and fairness through several key definitions.
- Several provisions of the Enforcement Executive Order apply not just to traditional agency administrative enforcement or adjudication, but also to a broader category of agency actions encompassed by the term **legal consequence**.
- Similarly, the Enforcement Executive Order limits certain agency enforcement actions that would result in **unfair surprise**.

Key Definitions – Legal Consequence

- **Legal Consequence** is defined as “the result of agency action that directly or indirectly affects substantive legal rights or obligations.”
- The Enforcement Executive Order directs that the meaning of this term be informed by three judicial decisions standing for the following propositions:
 - A legal consequence can flow from both **negative** determinations and **affirmative** determinations. For example, a negative determination by an agency that a particular statute or regulation does not apply could limit the potential liability of a regulated party, while an affirmative determination could deny a safe harbor.
 - A determination as to an agency’s regulatory jurisdiction results in a legal consequence if it has an **immediate and practical impact** on the regulated party.
 - A letter or order establishing greater liability for a regulated party in a subsequent enforcement action has a legal consequence.
- The Enforcement Executive Order restricts the use of agency guidance to articulating the agency’s understanding of how a statute or regulation applies to particular circumstances.
 - As such, a **guidance document** cannot, by itself, create a legal consequence.

Key Definitions – Unfair Surprise

- **Unfair Surprise** is defined as “a lack of reasonable certainty of fair warning of what a legal standard administered by an agency requires.”
 - In *Christopher v. SmithKline Beecham Corp.*, the Supreme Court found that courts should not apply *Auer* when deference to an agency’s interpretation would result in an “unfair surprise.”
 - The Enforcement Executive Order tries to limit agency enforcement actions that would cause “unfair surprise,” and notes that the meaning of “unfair surprise” should be informed by examples discussed in *Christopher v. SmithKline Beecham Corp.*, which include:
 - Agency interpretation of ambiguous regulations that imposes new liability on a regulated party for past actions;
 - New agency interpretation during an adjudication that imposes liability for past actions taken in good-faith reliance on an agency pronouncement; and
 - Agency action that does not provide “fair warning” of what is required or prohibited.
 - *SmithKline Beecham* notes, however, that “unfair surprise” does not include a new interpretation established by the agency through notice-and-comment rulemaking.

Key Definitions – Adjudication and Enforcement Actions

- Subject to the exemptions described on slides 13 and 14, the Enforcement Executive Order generally applies to administrative enforcement actions, adjudications, and a broader category of agency actions encompassed by the term **legal consequence**.
- Neither administrative enforcement action nor adjudication are specifically defined by the Enforcement Executive Order.
 - However, the Administrative Procedure Act (**APA**) has several definitions of **adjudication**:
 - **General Adjudication** is defined as an “agency process for formulation of an order”;
 - **Formal Adjudication** is defined as an “adjudication required by statute to be determined on the record after opportunity for agency hearing”; and
 - **Informal Adjudication** is defined as an agency proceeding with “[p]rompt notice . . . of the denial in whole or in part of a written application, petition, or other request of an interested person.”
 - Administrative enforcement action, by contrast, is not defined in the APA, but is generally understood to include:
 - Consent orders;
 - Cease and desist orders;
 - Civil litigation – except by the DOJ;
 - Agency declaratory orders;
 - Under some circumstances, a Matter Requiring Attention (MRA) or Matter Requiring Immediate Attention (MRIA) may also be an administrative enforcement action.

Scope – May Include Independent Agencies

- Notably, unlike the Guidance Executive Order, there is a strong argument that the Enforcement Executive Order applies to **independent agencies**.
- The [American Bankers Association](#) and [one scholar](#) have taken the view that Independent Agencies are covered by the Enforcement Executive Order.
- If independent agencies are covered, it is unclear why the drafters did not state so directly.

The **Guidance Executive Order** defines “agency” by reference to Clinton-era Executive Order 12866 as any **executive department**, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government.

Executive Order 12866 specifically excludes “**independent regulatory agencies**.”

The **Enforcement Executive Order** defines “agency” by reference to 5 U.S.C. § 105 as “an Executive department, a Government corporation, or an **independent establishment**.”

An **independent establishment** is an establishment in the executive branch – other than the United States Service or Postal Regulatory Commission – which is not an:

- Executive Department;
- Military Department;
- Government Corporation (or part thereof); or
- Part of an Independent Establishment.

DOJ Exemption

- The Enforcement Executive Order does not apply to **criminal investigations or prosecutions** and **civil enforcement actions or related investigations** by the DOJ, including actions related to a civil investigative demand.
- However, the Enforcement Executive Order’s safeguard with respect to the limitation on the use of guidance documents was previewed by several recent DOJ policies:
 - The 2017 [Sessions Memo](#) and 2018 [Brand Memo](#) limited the use of guidance documents to prohibit the DOJ from:
 - Issuing guidance documents that have not been subject to notice-and-comment rulemaking that create rights or obligations binding on a private parties;
 - Using guidance documents to “coerce regulated parties into taking any action or refraining from taking any action beyond what is required” by a statute or regulation; and
 - Bringing an affirmative civil enforcement action against a regulated party solely on the basis of “noncompliance with guidance documents.”
 - In December 2018, the DOJ updated the [U.S. Attorney’s Manual](#) to codify that “[c]riminal and civil enforcement actions brought by [DOJ] must be based on violations of **applicable legal requirements**, not merely noncompliance with a guidance document issued by federal agencies.”

Other Exemptions

- In addition to the DOJ exemption, the Enforcement Executive Order does not apply to:
 - Any action related to **foreign or military affairs** or a **national security** or **homeland security** function of the United States (other than procurement actions and actions involving the import or export of non-defense articles and services);
 - Any action related to detention, seizure, or destruction of counterfeit or pirated goods or other **goods that infringe intellectual property rights**;
 - Investigation of misconduct by an agency employee; or
 - Anything else that would in the judgment of the agency head **undermine national security**.

Transparency and Fairness Safeguards



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Safeguard #1: Limitations on Reliance on Guidance

- Under the Enforcement Executive Order, reliance on guidance is **expressly limited**.
- New standards of conduct may not be imposed by guidance unless expressly authorized by law or as expressly incorporated into a contract.
 - Guidance should be limited to merely articulating the agency’s understanding of how a statute or regulation applies to particular circumstances.
- Noncompliance with a standard of conduct announced solely through guidance **cannot be a violation of law**. Any administrative enforcement action, adjudication, or imposition of a legal consequence must be established by a violation of a statute or regulation.

Safeguard #2: Fairness and Advance Notice

- Guidance may be cited in an administrative enforcement action, adjudication, or other imposition of a legal consequence as a means of conveying the agency's understanding of how a statute or regulation applies to a particular circumstance if the agency has **notified the public in advance** of that understanding.
 - Notice can be provided through publication in the Federal Register or in a single, searchable guidance database on the agency's website.
- Agencies may not take an enforcement action, adjudication, or other imposition that has a **legal consequence** if doing so would cause an **unfair surprise**.
- In addition, with respect to jurisdictional determinations, an agency must **provide the public with notice**, either in the Federal Register or on its searchable guidance database **before** the agency may:
 - Rely on a decision in an agency adjudication, administrative order, or agency document to assert a new or expanded claim of jurisdiction;
 - 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; or
 - Seek judicial deference to its interpretation of a document arising out of litigation (other than a published opinion of an adjudicator) in order to establish a new or expanded claim or jurisdiction.

Safeguard #3: Opportunity to Contest Agency Determinations

- Agencies must provide regulated parties with an **opportunity to contest** any agency action that would result in a legal consequence **before taking that action**.
 - The opportunity to contest includes, but is not limited to, agency action through “no-action letter, notice of noncompliance, or other similar notice.”
 - A regulated person must be offered the opportunity to be heard, either in person or in writing, and the agency must respond in writing and articulate the basis for its action.
- The Enforcement Executive Order provides three **categorical exceptions** to the opportunity to contest:
 - Settlement negotiations;
 - Notices of prospective legal actions; and
 - Litigation already in court.
- There is also an exception for a serious threat to health, safety, or other emergency or where a statute specifically authorizes proceeding without a prior opportunity to be heard.
 - In these instances, however, an agency must afford the regulated person an opportunity to be heard “as soon as practicable.”

Safeguard #4: Reasonable Administrative Inspections

- Any agency that conducts **civil administrative inspections** must publish a rule of agency procedure governing such inspections, if such a rule does not already exist, and must comply with that rule going forward.
- The term **civil administrative inspection** is not defined in the Executive Order or by statute, regulation, or case law.

Safeguard #5: Appropriate Procedures for Information Collections

- The Enforcement Executive Order also imposes new requirements on **agency information collection**.
 - Agency collection of information about a regulated party’s compliance with legal requirements must comply with the **Paperwork Reduction Act**.
 - The Paperwork Reduction Act prohibits a regulated party from being penalized for failing to comply with an information collection burden unless the agency has received approval from the Director of OMB by means of a “control number.”
- If the agency collects information in the course of an investigation, the agency must:
 - Display a valid control number assigned by the Director of OMB; or
 - Inform the recipient that no response is legally required.
- This requirement does not apply to:
 - Intelligence activities;
 - Compulsory process pursuant to the Antitrust Civil Process Act and the Federal Trade Commission Improvements Act;
 - Criminal investigations, prosecution, or disposition of a particular criminal manner;
 - Civil action in which the United States, agency, or official is a party;
 - Civil investigative demands; or
 - Administrative action or investigation involving an agency against specific entities.

Encouraging Cooperation in Enforcement



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Encouraging Cooperation in Enforcement

- The Enforcement Executive Order requires agencies to propose procedures to encourage **private-sector cooperation** in enforcement. This includes:
 - Incentivizing regulated parties to voluntarily **self-report** regulatory violations in exchange for **reductions or waivers** of civil penalties;
 - Encouraging **voluntary information sharing** between agencies and regulated parties; and
 - Providing **pre-enforcement rulings** to regulated parties.
 - Specifically, this requires agencies to provide a formal written communication responding to an inquiry by a regulated party concerning compliance with the requirements of a particular interpretation of the law or application of a specific set of facts.
- A few agencies, such as the [DOJ](#) and [CFTC](#), implemented some of these procedures before the Enforcement Executive Order was issued.
 - If an agency believes its current procedures are adequate, it must submit a report to the President describing those procedures.
 - Similarly, if an agency believes it lacks the resources to implement such procedures, it must submit a report to the President describing its need for more resources.

Davis Polk Contacts

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