

Leaning Into Transparency

EXECUTIVE ORDER ON GUIDANCE



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Executive Summary



Guidance 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**).
- The two executive orders are consistent with many of the recommendations made by the Administrative Conference of the United States (**ACUS**), as well as certain actions already taken by regulatory agencies during the Trump Administration.
- This visual memorandum, which focuses on the Guidance Executive Order, is one of two public memoranda that explain the Guidance and Enforcement Executive Orders.
- Our visual memorandum on the **Enforcement Executive Order** will be published soon.

Key Takeaways

- The Guidance Executive Order's underlying principle is that in a constitutional democracy and under the rule of law, agencies should be **transparent** and follow **public processes** when interpreting legal obligations.
- As such, the Guidance Executive Order requires executive agencies to **provide for notice and comment** before finalizing **significant guidance**. Executive agencies will also generally be required to respond publicly to major concerns raised in any such comments.
- Furthermore, the Guidance Executive Order requires that significant guidance documents be approved on a non-delegable basis by an **agency official appointed by the President** and requires agencies to create a **searchable, indexed database** that contains or links to all guidance documents.
- Application of the Guidance Executive Order extends only to **executive departments and agencies**, not independent agencies (see Section 5 of this memorandum).
- The Guidance Executive Order is not self-implementing. The Office of Management and Budget (**OMB**) must issue memoranda and, as appropriate, regulations implementing the order. This step is likely to take months.

Background



Types of Guidance

- **Guidance** is not defined in the Administrative Procedure Act (**APA**), but is commonly distinguished from APA “rules,” in that rules are generally required to be promulgated through notice and comment under the APA, 5 U.S.C. § 553.
- Agencies refer to guidance by **different terms**. Some common examples of guidance documents include:

- Presidential memoranda
- Guidelines
- Bulletins
- Compliance guides
- Frequently Asked Questions
- Interpretive letters
- Industry circulars
- Policy statements
- Supervisory letters
- Financial Institution letters
- Dear CEO letters
- Advisory opinions
- No-action letters
- User reference documents
- Administrative notices

Importance of Guidance

- Guidance documents serve as an essential tool for **agency regulators**.
- Similarly, **regulated parties** also rely on and frequently request guidance documents to assist in understanding their legal obligations.
- Guidance is not legally binding, but guidance nonetheless expresses agencies' views and often influences the behavior of regulated parties.
- The volume of regulatory guidance is colossal.
 - There is no centralized compilation of guidance.
 - Nor are there standardized procedures for issuing guidance documents.

“Guidance is ‘the bread and butter of agency practice.’”

– EPA lawyer quoted in [*Federal Agency Guidance: An Institutional Perspective*](#)

Framing the Debate

- The two executive orders reflect the intellectual influence of scholars focused on the rule of law and separation of powers who have warned about the proliferation of [“regulatory dark matter.”](#)
- The Executive Orders are also in line with many recommendations made by ACUS, an independent federal agency that brings together public and private sector experts to recommend improvements to administrative processes and procedures.
 - See, for example, [ACUS Recommendation 2017-5](#) and [ACUS Recommendation 2019-1](#)
 - See also [Federal Agency Guidance: An Institutional Perspective](#), a report prepared for the consideration of ACUS by Nicholas R. Parrillo.

Framing the Debate

- The executive orders also fit well within a long line of efforts by Presidential administrations to oversee and, as appropriate, rein in the activities of regulatory agencies.
 - Republican President Reagan issued the first major Executive Order requiring cost-benefit analysis of certain regulatory actions, EO 12291.
 - EO 12291 was replaced by Democratic President Clinton's **Executive Order 12866**, which was retained by Presidents Bush, Obama and Trump.
 - President Clinton's EO 12866 contained many of the same themes as President Reagan's EO 12291.
- As a result, should a Democrat be elected in 2020, the future of President Trump's executive orders on guidance is not as clear as one might think based on immediate partisan politics.
 - A Republican president will likely maintain them and OMB implementation would continue.
 - Election of a Democratic president does not guarantee that they will be rescinded although they could be amended.

Framing the Debate

- Also in the background are Congressional efforts to curtail the reach of the regulatory state through the Congressional Review Act.
 - From the 20 years since its enactment in 1996 through 2016, the Congressional Review Act was used to overturn a regulation only once.
 - In the first two years of the Trump Administration, however, the Congressional Review Act was used **16 times** to overturn rules issued by the previous administration.
- The Congressional Review Act borrows the APA's broad definition of **rule**, but unlike the APA's notice and comment requirements it does not carve out interpretive rules or general statements of policy, meaning that the Congressional Review Act's fast-track disapproval procedures may be used to disapprove many agency guidance documents.
- While successful Congressional Review Act resolutions of disapproval have to this point been Republican-driven, Congressional Democrats have also attempted to use the Congressional Review Act.
 - Both the FCC's decision on net neutrality and recent IRS regulations related to the state and local tax deduction have been the target of such efforts.
 - Should there be a change in Administration and in Senate control, certain late-stage Trump Administration regulatory efforts could be vulnerable to disapproval under the Congressional Review Act.

The Guidance Executive Order



Scope

- The Guidance Executive Order applies to “**agencies**,” defined to generally include any **executive department**, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government.

Executive Departments

- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Education
- Department of Energy
- Department of Health and Human Services
- Department of Homeland Security
- Department of Housing and Urban Development
- Department of Justice
- Department of Labor
- Department of State
- Department of the Interior
- Department of the Treasury
- Department of Transportation
- Department of Veterans Affairs

Others Included Within the Definition of Agency*

- Environmental Protection Agency (EPA)
- Committee on Foreign Investment in the United States (CFIUS)
- Financial Crimes Enforcement Network (FinCEN)
- Office of Foreign Assets Control (OFAC)

Scope

- The Guidance Executive Order **does not apply** to **independent agencies**, even if they otherwise would be included within the definition of agency.
- This means that these agencies, among others, are excluded from the scope of the Guidance Executive Order:
 - Board of Governors of the Federal Reserve System
 - Commodity Futures Trading Commission
 - Federal Communications Commission
 - Federal Deposit Insurance Corporation
 - Federal Energy Regulatory Commission
 - Federal Housing Finance Agency
 - Federal Trade Commission
 - National Labor Relations Board
 - Securities and Exchange Commission
 - Bureau of Consumer Financial Protection
 - Office of Financial Research
 - Office of the Comptroller of the Currency
- Even so, the Guidance Executive Order could have implications for independent agencies. Refer to Section 5 of this visual memorandum for additional details.

Key Definitions

- The Guidance Executive Order applies generally to **guidance documents**, and includes special rules related to **significant guidance documents**

The Guidance Executive Order defines **guidance document** broadly to be “an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.”

Certain agency actions are excluded from the definition of guidance document:

- Notice and comment regulations;
- Exempt regulations;
- Internal agency regulations;
- Internal agency legal opinions;
- Internal guidance not expected to have a substantial impact on regulated persons and advice; and
- Agency adjudication

The Guidance Executive Order defines **significant guidance documents** as those guidance documents that may be reasonably anticipated to:

- Result in an annual economic impact of **\$100 million** or more or have a material adverse effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments and communities;
- Create a **serious inconsistency** or otherwise interfere with the actions of another agency;
- **Materially alter the budget** or rights/obligations of entitlements, grants, user fees, or loan programs; or
- Generate **novel legal or policy issues** from legal mandates, **the President’s priorities**, or principles of EO 12866

Requirements of the Guidance Executive Order

- The Guidance Executive Order requires **OMB** to issue **implementing memoranda** or **regulations**, after which an agency must:
 - Create a **searchable database** on its website of all applicable guidance
 - All guidance documents in effect must be contained in or linked to in the database
 - The website must note that guidance is not binding and does not have the force of law
 - Guidance not included in the database may not be retained in effect by the agency, and going forward an agency may not issue a guidance document without including it in its database
 - The Enforcement Executive Order also requires the database to be used for notification purposes before an agency may take certain actions.
 - In the alternative, an agency may also provide the notice required by the Enforcement Executive Order through publication in the Federal Register.
 - **Review its guidance and rescind any guidance** which the agency determines should no longer be in effect
 - Rescinded guidance may not be cited or used by the agency except as a historical fact
 - If requested by the OMB Director, **submit a report** to the OMB Director with the reasons for maintaining in effect any guidance documents identified by the OMB Director.

Requirements of the Guidance Executive Order

- **Finalize regulations**, or amend existing regulations as necessary, to set forth **processes and procedures** for issuing guidance documents
 - These must include:
 - A requirement that each guidance document clearly state that it is non-binding except as authorized by law or contract; and
 - Procedures for the public to petition for withdrawal or modification of guidance, including a designation of the official(s) to which such a petition should be directed

Requirements of the Guidance Executive Order

- For all **significant guidance documents** the finalized regulations must include, unless these requirements are waived upon agreement by the agency and the Administrator of the Office of Information and Regulatory Affairs (**OIRA**), provisions requiring:
 - Public notice and comment for at least 30 days (subject to waiver);
 - Approval by a Presidential appointee within the relevant agency;
 - This approval requirement is **non-delegable**
 - Review by OIRA under EO 12866 (cost-benefit analysis); and
 - Compliance with applicable requirements for regulations or rules set forth in other executive orders – see next slide
- OIRA may create, by memorandum, exceptions from these requirements for certain categories of guidance documents.

Requirements of the Guidance Executive Order

- A significant guidance document is also required to comply with **five other executive orders** as if the guidance document is a rule or regulatory action that would have been subject to those executive orders.
- Three of these executive orders, EOs 12866, 13563 and 13609, relate to OIRA review processes.
 - As previously noted, EO 12866 was issued by President Clinton, and the latter two of these orders were issued by President Obama.
- The remaining two executive orders with which significant guidance documents must comply, EOs 13771 and 13777, were each issued by President Trump.
 - EO 13771 is perhaps the most notable of these five executive orders, in that it requires agencies to identify at least two existing regulations to be repealed when promulgating a new regulation.
 - Under the Guidance Executive Order, the same obligation would then apply to significant guidance documents.

Exemptions

- Some guidance documents, including significant guidance documents, are automatically **exempt** from the provisions of the Guidance Executive Order. These include:
 - any action pertaining to **foreign or military affairs**, or to a **national security or homeland security function** of the United States (other than guidance documents involving procurement or the import or export of non-defense articles and services);
 - any action related to a **criminal investigation or prosecution** or **any civil enforcement action or related investigation** by the DOJ, including any action related to a **civil investigative demand**;
 - any **investigation of misconduct** by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee;
 - any document exempt from disclosure under the Freedom of Information Act; and
 - any other circumstance which, in the judgment of an agency head, **would undermine national security**.
- The Guidance Executive Order is silent as to whether determinations that a guidance document is exempt from complying with the order is a determination to be made by the agency in question or by OMB, OIRA or some other party.
 - It is also unclear whether an agency may reach a blanket conclusion that *all* of its guidance documents benefit from this exemption, or whether a case-by-case or category-by-category determination must be made.

Waivers

- Even if not automatically exempted, the Director of OMB, or the Director's designee, may **waive or delay compliance** with respect to the requirement that the agency:
 - Establish and maintain a **searchable database** of guidance documents on the agency's website;
 - **Review its guidance documents** and **rescind guidance documents** that should no longer be in effect; or
 - Avoid **citing, using, or relying on rescinded guidance documents**.
- These waivers may be issued for individual guidance documents or may be issued with respect to broader categories of guidance documents.

Implications for Agencies Subject to the Executive Order



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Implications for Agencies Subject to the Executive Order

- In its [Sourcebook of United States Executive Agencies](#), ACUS notes that “there is no authoritative list of government agencies,” and that “every list of federal agencies in government publications is different.”
 - *“For example, FOIA.gov lists 118 separate executive agencies that comply with the Freedom of Information Act requirements imposed on every federal agency. This appears to be on the conservative end of the range of possible agency definitions. The United States Government Manual lists 305 unique or subcomponent units as agencies. An even more inclusive listing comes from USA.gov, which lists over 600 government departments and agencies.”*
- Given the breadth of potential application of the Guidance Executive Order, we will not attempt to predict here the implications for every regulated industry.
- We instead offer comments on a few agencies that we expect to be affected – as well as a few where the effects are expected to be of less significance.

- **Key takeaway:** DOJ guidance is expected to be generally exempt from the provisions of the Guidance Executive Order, but DOJ has been a leader in pushing for re-assessing the use of guidance and we expect that to continue.
 - In November 2017, then-Attorney General Jeff Sessions issued a [memorandum](#) to all DOJ components prohibiting use of guidance as a substitute for rulemaking.
 - This memorandum also sets forth principles to be followed by DOJ when issuing guidance documents, including making explicit that such documents do not have legally binding effect or create new obligations.
 - In January 2018, then-Associate Attorney General Rachel Brand issued a [memorandum](#) to heads of DOJ litigating components and U.S. Attorneys applying similar principles to use of guidance in affirmative civil enforcement.
 - In May 2019, Principal Deputy Associate Attorney General Claire McCusker Murray gave a [speech](#), which we have [discussed in a blog post](#), chastising in particular guidance documents that purport to do more than merely mirror what the law requires.
 - Murray emphasized that this “subregulatory guidance isn’t law – it’s just paper.”

Treasury – IRS

- **Key takeaway:** The Guidance Executive Order is unlikely to cause a material shift in administration of the tax law, though some practices could be affected at the margins.
- Earlier this year, the Treasury Department announced and reconfirmed [similar standards](#) for the tax regulatory process to those that will be required by the Guidance Executive Order.
 - For example, Treasury has announced that neither Treasury nor the IRS will argue that sub-regulatory guidance has the force and effect of law and will not seek judicial deference to that guidance in litigation.
- Some Treasury and IRS practices, however, may need to change to comply with the requirements of the Guidance Executive Order.
 - For example, **guidance documents are not currently searchable** on the IRS website at a single location.
 - And given the Guidance Executive Order’s broad definition of guidance, which covers documents such as FAQs, there will be additional constraints on IRS use of such FAQs.

Treasury – OFAC

- **Key Takeaway:** In light of the Guidance Executive Order's broad exemptions for foreign affairs and national security, we expect the Guidance Executive Order to have a limited impact on economic sanctions.
- This would be broadly consistent with current practice. For example, OFAC rules and regulations are often, though not always, promulgated under the foreign affairs exception to the APA.

Treasury – FinCEN

- **Key takeaway:** The impact of the Guidance Executive Order to FinCEN is less clear than for CFIUS (see slide 28) and OFAC.
- The Guidance Executive Order applies to FinCEN; however, the extent to which FinCEN will assert the **national security exemption** is not known.
 - FinCEN defines its mission as to “safeguard the financial system from illicit use, combat money laundering, and promote national security through the strategic use of financial authorities and collection, analysis, and dissemination of financial intelligence.”
 - Some FinCEN regulations serve a national security and counter-terrorism function; however, unlike OFAC, FinCEN does not ordinarily assert the foreign affairs exception to the APA when it promulgates regulations, even where the exception would appear to be applicable, such as in connection with USA PATRIOT Act Section 311 impositions of special measures against foreign financial institutions determined to be of money laundering concern.
- Moreover, some of FinCEN’s authorizing statutes and regulations would likely not fall under the national security exemption.
 - For example, FinCEN guidance for financial institutions in dealing with **U.S. cannabis businesses** would presumably fall outside of national security.

- **Key takeaway:** The Guidance Executive Order is likely to have been designed to have a major impact on environmental guidance.
 - For example, given the current focus on environmental issues such as climate change and wetlands, environmental guidance (which is routinely issued by EPA) is more likely to raise “novel legal or policy issues arising out of . . . the President’s priorities,” meaning that much of EPA’s guidance may be considered “significant,” even if the guidance may not otherwise meet or have met the definition of significant guidance document.
 - Additionally, the Fact Sheet to the Guidance Executive Order specifically cites only two examples, both of which are environmental, to support its claim that “agencies have abused their power by imposing unlawful and secret interpretations of regulations.”
- In addition, although a list of EPA’s **significant guidance documents** (as defined under previous OMB guidance) currently appears on the EPA’s [website](#), other EPA guidance is not compiled in a central location.

CFIUS

- **Key Takeaway:** As with OFAC, we expect the Guidance Executive Order to have a limited impact on CFIUS, if it has any impact at all.
 - Indeed, other than occasional procedural FAQs, the one time CFIUS offered “guidance” was in 2008 in direct response to a Congressional instruction to do so.
 - And, similar to OFAC, CFIUS’s regulations are published and commented upon under statutory rules that intentionally depart from the APA.

Implications for Independent Agencies



Implications for Independent Agencies

- As noted earlier, the Guidance Executive Order does not apply to independent agencies.
- Historically, however, certain independent agencies have at times **elected voluntarily to comply** with certain executive orders that do not by their terms apply to independent agencies. For example:
 - While the SEC is not required to comply with EOs 12866 and 13563, its current economic analysis [guidance](#) “draws on” the cost-benefit analysis principles set forth in those executive orders.
 - When he was Acting Director of the CFPB, Mick Mulvaney [reportedly](#) asked for a review of potential voluntary compliance by the CFPB with Trump Administration executive orders.
 - The NCUA has [chosen](#) voluntarily to “comply with the spirit” of EO 13777.
 - In 2017, OIRA issued a memorandum with suggestions for independent agencies choosing voluntarily to comply with Executive Order 13771.

Implications for Independent Agencies

- Whether and to what extent independent agencies will elect voluntarily to comply with the Guidance Executive Order remains to be seen, though for the financial regulators a reconsideration of the role of guidance is already well underway.
 - On September 11, 2018, the **federal banking agencies** [issued a statement](#) explaining that **supervisory guidance** does not have the force and effect of law and should not be the basis for enforcement actions, which we have [discussed in this blog post](#).
 - Shortly thereafter, SEC Chairman Clayton [issued a statement](#) stressing the distinction between SEC rules or regulations and views provided by SEC staff.
 - During [Senate Banking Committee testimony](#) on May 15, 2019, Federal Reserve Vice Chairman for Supervision Quarles discussed the proper division between supervision and regulation:
 - *“It’s incumbent on us at the Fed and all of us to **think very carefully in a way that hasn’t been done in decades** about where we are drawing the line between what can be accomplished through supervision and what types of things have to be accomplished through regulation . . . and the due process requirements that apply to regulation under the Administrative Procedure Act.”*
 - In a [recent speech](#), Vice Chairman Quarles also noted that he would “welcome greater legal scholarship on the due process considerations associated with bank supervision as a process distinct from bank regulation . . . While it is important for bank supervision to be up to the task of assessing the world’s largest banks . . . **an equally important task is making sure that supervisors are acting fairly.**”

Implications for Independent Agencies

- Even if they are not required to comply or do not choose voluntarily to comply with the Guidance Executive Order, independent agencies in some cases are already subject to similar requirements.
 - On April 11, 2019, OMB [issued a memo](#) setting forth a process for OIRA review of potentially major rules for purposes of the Congressional Review Act, including those to be proposed by independent agencies.
 - As a result, some guidance documents proposed by independent agencies **may be subject to OIRA review**, notwithstanding that the Guidance Executive Order does not apply to independent agencies.

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