



Trump Issues Executive Orders Limiting Regulation by Agency Guidance

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It's well-known that the Trump administration has sought policies of deregulation over the past several years. The administration places emphasis on proper enforcement of existing rules and regulations as a means of achieving compliance rather than promulgating more regulations. In line with these objectives, President Trump recently issued two Executive Orders (EOs) to curtail use of guidance documents. EO 13891, titled "Promoting the Rule of Law Through Improved Agency Guidance Documents," and EO 13892, titled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication;" both center on limiting the ability of agencies to regulate through guidance and to otherwise avoid the notice and comment rulemaking process.

Of the two, EO 13891 imposes more affirmative obligations on agencies. Among other things, it requires agencies to (i) post all active guidance documents on their website for easier access by the public, (ii) complete public notice and comment before finalizing "significant" guidance (i.e. those with potential impacts on the economy of \$100 million or more), (iii) review existing guidance for potential rescission, and (iv) allow the public to petition agencies to amend or withdraw such guidance. Perhaps most importantly, EO 13891 requires all agencies to explicitly indicate on future guidance that it is not "binding."

EO 13892 continues the spirit of its counterpart, but provides more general policy requirements than outright impositions. The EO provides that agencies are not permitted to use guidance documents to impose standards or legal consequences on parties. To this effect, the EO states, "When an agency uses a guidance document to state the legal applicability of a statute or regulation, that document can do no more, with respect to prohibition of conduct, than articulate the agency's *understanding* of how a statute or regulation applies to particular circumstances." (emphasis added). The EO also requires agencies to adhere to known principles of due process in administrative enforcement actions, which promotes transparency by the agency and avoids unfair surprise.

Practically speaking, EO 13892 may sound like it has a lot of bite, but the actual effect remains to be seen. However, the effect of the duties imposed on agencies by EO 13891 is more than mere theory. The regulated community (and their lawyers) will immediately benefit from a more concentrated and streamlined agency guidance system with improved accessibility and a clearer understanding of what

agency guidance means for them. Furthermore, knowing which principles from past guidance are still considered acceptable by agencies and those that are not will paint a clearer picture of what compliance with ever-changing rules looks like. In addition, while some agencies already state that guidance documents are nonbinding, this statement is now required.

The rub, though, is that these EOs impose more actions on agencies that are already limited in funding. Development of a streamlined system of guidance documents on agency websites while reviewing them for potential rescission may be easier said than done. Furthermore, even if the EOs do have profound beneficial effects for the regulated community, it is important to remember that 2020 is an election year, and EOs can be rescinded freely by a future President.

Promoting the Rule of Law Through Improved Agency Guidance Documents, Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 15, 2019).

Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Exec. Order No. 13,892, 84 Fed. Reg. 55239 (Oct. 15, 2019).

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