King & Spalding
Client Alert

Appellate, Constitutional and Administrative Law
Environmental, Health and Safety
Special Matters and Government Investigations

OCTOBER 15, 2019

For more information, contact:

Marcella Burke
+1 202 626 9261
mburke@kslaw.com

Jeffrey S. Bucholtz
+1 202 626 2907
jbucholtz@kslaw.com

Matthew H. Baughman
+1 404 572 4751
mbaughman@kslaw.com

Jeremy M. Bylund
+1 202 626 5455
jbylund@kslaw.com

Nikesh Jindal
+1 202 383 8933
njindal@kslaw.com

I. Cason Hewgley IV
+1 202 626 5455
chewgley@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 713 751 3261

Taking Cues from Justice Department, New Executive Orders Limit Agency Use of Guidance to Establish and Enforce Regulatory Policy

On October 9, 2019, President Trump signed two executive orders: *Promoting the Rule of Law Through Improved Agency Guidance* (Executive Order 13891) (the "Guidance Executive Order") and *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* (Executive Order 13892) (the "Enforcement Executive Order").

These two executive orders, following the lead of two past Department of Justice memoranda, seek to protect against administrative overreach. Nearly two years ago, the Department of Justice sharply restricted its use of guidance except in narrow categories. On November 16, 2017, then-Attorney General Sessions issued a memorandum, *Prohibition on Improper Guidance*. Building on the Sessions Memo, then-Associate Attorney General Brand issued a memorandum on January 25, 2018, *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases*. Along the same lines, the new executive orders limit the authority of agencies to establish and enforce regulatory policy through guidance.

The Guidance Executive Order, taking after the Sessions Memo, requires that new legally binding obligations placed on the public must be promulgated as regulations according to the notice-and-comment procedures of the APA; guidance should only clarify existing obligations. To further increase regulatory transparency, this Executive Order requires the creation of a single, searchable database at each agency containing guidance. These databases must note that guidance is generally non-binding. Existing guidance must be rescinded if not placed in the database. Agencies cannot rely on rescinded guidance.

Also under the Guidance Executive Order, agencies must establish procedures for issuing new guidance. Guidance must clearly state it is not binding except as authorized by law or incorporated in a contract. And there must be a procedure for petitioning the agency to withdraw or modify its guidance. For "significant guidance," the agency must promulgate procedures that provide for a 30-day public comment-period, provide for a public response to comments, require that the agency head or agency component head appointed by the President approve such guidance, require the guidance be submitted to the Office of Information and Regulatory Review (OIRA) before issuance, and ensure compliance with certain executive orders, previously applicable only to rules, which the order explicitly extends to guidance.

The Enforcement Executive Order follows the lead of the Brand Memo and limits agency use of guidance in enforcement actions. At its core, this executive order prohibits administrative enforcement action unless the initiating agency previously gave public notice through the Federal Register or the agency's website of both its jurisdiction over the relevant conduct and the standards governing that conduct. The Enforcement Executive Order prohibits agencies from taking an administrative enforcement action or otherwise making a determination that carries a legal consequence unless the agency can "establish a violation of law by applying statutes or regulations," rather than mere noncompliance with agency guidance.

The Enforcement Executive Order prohibits an agency from taking any action that has a "legal consequence" before providing an opportunity to be heard regarding the agency's proposed legal and factual determinations. This pre-enforcement process extends to "a no-action letter, notice of noncompliance, [and] similar notice[s]," but does not apply to settlement negotiations, notices of a prospective legal action, litigation before courts, emergency situations, or where a statute allows proceedings without an opportunity to be heard.

Finally, the Enforcement Executive Order contains process-oriented provisions. Within 270 days of the date of Executive Order 13892, agencies must propose procedures that: (i) encourage voluntary self-reporting of violations in exchange for civil penalty reductions/waivers; (ii) encourage voluntary information sharing; and (iii) provide pre-enforcement rulings (*i.e.,* agency interpretations of legal requirements, advisory opinions, etc.) to regulated parties. Agencies may petition the President if they believe their current procedures are sufficient or they lack resources to create the required procedures. In addition, no later than 120 days after the date of the Enforcement Executive Order, every agency lacking a procedural rule for conducting civil administrative inspections must publish one. Last, the Enforcement Executive Order requires agencies to comply with the Paperwork Reduction Act when they seek compliance information from regulated entities and individuals.

Unfortunately, both executive orders contain a litany of exceptions that could limit their efficacy. These exceptions include: OMB functions, appropriations limitations, foreign or military affairs, national security or homeland security functions (except for procurement), any criminal investigation or civil enforcement action by the Department of Justice, investigations of misconduct by agency employees, or any other context that could undermine national security. The large carve-outs for the Department of Justice are especially troubling considering that the Department handles such a large percentage of government litigation. However, the executive orders' inapplicability to the Department of Justice may be mitigated by the Sessions and Brand memoranda. Formally enshrined in the Justice Manual, the Department of Justice is still bound by the dictates of the Sessions Memo, *see* U.S. Dep't of Justice, Justice Manual §§ 1-19.000, and the Justice Manual still applies the principles of the Brand Memo to affirmative civil enforcement cases by the Department, and also extends those principles to criminal enforcement, *see* U.S. Dep't of Justice, Justice Manual § 1-20.000. Still, but for this exception, these executive orders would have strengthened protections for targets of the Department of Justice.

Despite these exceptions, these executive orders should give those litigating opposite the government, ether offensively or defensively, good arguments to defeat judicial deference to an agency's interpretation of its own regulations in light of *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (noting that where an agency does not adopt a regulatory position as authoritative, deference is not due to that position). After all, *Auer* applies to an agency's interpretation of its own regulations, which would presumably fall within these executive orders if the interpretation were not itself promulgated in accordance with the specified procedures. As such, it seems likely that agencies will be required to disclaim many interpretations as non-binding in their guidance databases. Litigants should carefully follow how agencies handle these documents and look for opportunities to argue against deference.

Moreover, the regulated community should be mindful of the complex exceptions set out in these executive orders and recognize that it will take time for agencies to promulgate the new procedures. Accordingly, companies seeking to challenge regulatory action, or facing administrative enforcement actions, investigations, information-gathering requests, or newly published guidance in the Federal Register or on an agency's website should be alert to these executive orders and consider whether the agency is complying with them. Regulated parties should also review their pending matters and litigation before or against agencies to consider new arguments regarding reliance on agency guidance. Consultation with experienced administrative, regulatory, and litigation counsel can help regulated actors take full advantage of these executive orders and ensure that they fulfill their purpose of promoting the rule of law, transparency, and fairness.