

October 25, 2019

## Executive Orders Regarding the Issuance and Use of Agency Guidance

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### Orders Impose Publication Requirements, Heightened Requirements for “Significant Guidance Documents,” and Restrictions on the Reliance on Guidance Documents in Certain Administrative Actions

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#### SUMMARY

On October 9, President Trump signed two Executive Orders aimed, respectively, at (1) [promoting](#) “improved agency guidance documents” and (2) [enhancing](#) “transparency and fairness” in certain administrative enforcement actions and adjudications.

The Executive Order on “Promoting the Rule of Law Through Improved Agency Guidance Documents”<sup>1</sup> (the “Guidance Order”) requires covered agencies to publish guidance documents on their websites in “a single, searchable, indexed database,” rescind potentially obsolete guidance documents, establish procedures for the public to petition for the withdrawal or modification of guidance documents, and comply with additional requirements for the issuance of guidance documents that are deemed to be “significant.” Notably, the Guidance Order does not apply to “independent regulatory agencies,” which include the Federal Reserve, the CFTC, the FDIC, the SEC, the CFPB and the OCC (the full list is included in the attached Appendix).

The Executive Order on “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication”<sup>2</sup> (the “Enforcement and Adjudication Order”) applies to a broader universe of agencies, including the independent regulatory agencies, and provides that, when “tak[ing] an administrative enforcement action, engag[ing] in adjudication, or otherwise mak[ing] a determination that has legal consequence for a person,” an agency “must establish a violation of law by applying statutes or regulations” and “may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations.” In addition, an

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agency must publish any materials upon which it intends to rely in asserting a new or expanded claim of jurisdiction “before the conduct over which jurisdiction is sought occurs.” Finally, agencies are directed to propose procedures affording affected persons an opportunity to contest agency determinations and to encourage self-reporting of regulatory violations by regulated parties and voluntary information-sharing among regulated entities.

Neither Order applies to any agency action pertaining to foreign or military affairs or national or homeland security, or to any action relating to a “criminal investigation or prosecution” or “civil enforcement action or related investigation” by the Department of Justice.

In addition, neither Order creates any private rights of action or other substantive or procedural rights or benefits enforceable by any party against the United States, its agencies, officers and employees, or other persons.

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### THE GUIDANCE ORDER

The Guidance Order states that “it is the policy of the executive branch, to the extent consistent with applicable law, 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.” Accordingly, following the release of an “Implementing Memorandum” by the Office of Management and Budget (“OMB”), covered agencies will generally be required to comply with the following requirements in connection with the issuance and public disclosure of guidance documents.<sup>3</sup>

#### A. Transparent Use of Guidance Documents

1. **Online Guidance Database** – Within 120 days of the issuance of the Implementing Memorandum, each covered agency is directed to establish on its website a single, searchable, indexed database that contains or links to all of its guidance documents then in effect (an “Online Guidance Database”); the website must also note that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.
2. **Rescinding Guidance** – Within 120 days of the issuance of the Implementing Memorandum, each covered agency is directed to rescind those guidance documents that it determines should no longer be in effect, and guidance will not be effective unless included in the Online Guidance Database. Each covered agency is also directed not to issue guidance without including it in the agency’s online database.

#### B. Procedures for Issuing Guidance Documents

1. **Procedures for Issuing Guidance Documents** – Within 300 days of the issuance of the Implementing Memorandum, each covered agency is directed to establish processes and procedures that must include:
  - a. a requirement that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract;

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- b. procedures allowing the public to petition for the withdrawal or modification of a particular guidance document; and
- c. for guidance documents deemed to be “significant,” provisions requiring:
  - i. a period of public notice and comment of at least 30 days before issuance of a final guidance document, and a public response from the agency to major concerns raised in comments;
  - ii. approval on a non-delegable basis by the agency head appointed by the President, before issuance;
  - iii. review by OMB’s Office of Information and Regulatory Affairs (“OIRA”), before issuance; and
  - iv. compliance with the applicable requirements for regulations or rules set forth in Executive Order 12866 (Regulatory Planning and Review),<sup>4</sup> Executive Order 13563 (Improving Regulation and Regulatory Review),<sup>5</sup> Executive Order 13609 (Promoting International Regulatory Cooperation),<sup>6</sup> Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs),<sup>7</sup> and Executive Order 13777 (Enforcing the Regulatory Reform Agenda).<sup>8</sup>

The requirements described in 1.c do not, however, apply to a “pre-enforcement ruling,” which is defined as an agency’s formal written communication in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person.

- 2. Significant Guidance Document** – The definition of “significant guidance document” is the same as that of “significant regulatory action” as defined in Executive Order 12866, in that the guidance document may reasonably be anticipated to:

- a. lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities;
- b. create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- c. materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or
- d. raise novel legal or policy issues arising out of legal mandates, the President’s priorities or the principles of Executive Order 12866.

### C. Exceptions and Limitations

1. The procedural requirements of the Guidance Order do not apply to the review relationship (including significance determinations) between OIRA and any component of the Department of the Treasury or the latter’s compliance with other relevant Executive Orders. Additionally, the Guidance Order does not apply to any action that pertains to foreign or military affairs, or national or homeland security (including circumstances in which application of the Guidance Order would undermine national security), nor does it apply to any action related to a criminal investigation or prosecution or any civil enforcement action or related investigation by the Department of Justice (including any action related to a civil investigative demand under 18 U.S.C. 1968). Additional exemptions are provided for internal investigations or proceedings concerning agency employees, and for any document or information that is exempt from disclosure under the Freedom of Information Act.

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2. The Guidance Order does not create any private rights of action or other substantive or procedural rights or benefits enforceable by any party against the United States, its agencies, officers and employees, or other persons.

OMB is authorized to waive compliance with the foregoing requirements or to extend the compliance deadlines, while OIRA is responsible for establishing exceptions for categories of guidance documents and categorical presumptions regarding whether guidance documents are “significant.”

As noted above, the Guidance Order does not apply to independent regulatory agencies, such as the Federal Reserve, the CFTC, the FDIC, the SEC, the CFPB, and the OCC (the full list is included in the attached Appendix), although these agencies could choose to comply voluntarily with some of these requirements. In fact, several independent regulatory agencies have recently adopted procedures that may satisfy certain of the Guidance Order’s requirements. For example, on September 11, 2018, the Federal Reserve, the FDIC, the OCC, the CFPB, and the National Credit Union Administration jointly issued an interagency statement clarifying that “supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance” and that, accordingly, agency citations must be grounded in “violations of law, regulation, or non-compliance with enforcement orders or other enforceable conditions.”<sup>9</sup> These agencies also noted that they have at times sought public comment on supervisory guidance and pledged to make the role of supervisory guidance clear in communications with their supervised financial institutions. Similarly, on September 13, 2018, the Chairman of the SEC released a statement addressing staff communications, which noted that the SEC’s “longstanding position is that all staff statements are nonbinding and create no enforceable legal rights or obligations of the [SEC] or other parties.” This statement also explained that the directors of the Division of Enforcement and the Office of Compliance Inspections and Examinations have been instructed “to further emphasize this distinction to their staff” and that all of the SEC’s divisions “have been and will continue to review whether prior staff statements and staff documents should be modified, rescinded or supplemented in light of market or other developments.”<sup>10</sup>

The Guidance Order should also be read in conjunction with the April 11, 2019 OMB memorandum<sup>11</sup> to the leaders of all executive departments and federal agencies, establishing guidelines for properly classifying “rules” for purposes of agency compliance with the Congressional Review Act (the “CRA”). Specifically, the OMB memorandum, which became effective on May 11, 2019, (1) “reaffirms the broad applicability of the CRA to all Federal agencies . . . including the historically independent agencies” and (2) sets forth a process for identifying “major” rules pursuant to the CRA and provides guidance for the type of analysis required for these determinations. Notably, the OMB memorandum states that agencies “should not publish a rule—major or not major—in the *Federal Register*, on their websites, or in any other public manner before OIRA has made the major determination and the agency has complied with the requirements of the CRA.”

## THE ENFORCEMENT AND ADJUDICATION ORDER

The Enforcement and Adjudication Order states that “[n]o 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” and that “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.” The Order therefore requires all covered agencies (including the independent regulatory agencies) to comply with the following requirements.

### A. Proper Reliance on Guidance Documents

1. In taking an administrative enforcement action, engaging in adjudication, or making a determination that has “legal consequence” for a person, an agency must establish a violation on the basis of statutes or regulations, rather than noncompliance with a standard of conduct announced solely in a guidance document. Applied in the context of banking supervision, this provision could be read to encompass, among other agency actions, Matters Requiring Attention (“MRAs”) and Matters Requiring Immediate Attention (“MRIAs”), which are agency findings that can result in supervisory rating downgrades. However, the Order does not specifically reference bank examination findings, which are frequently based on unsafe or unsound banking practices, rather than on violations of statutes or regulations. Whether this Order would be violated if a banking agency downgraded an institution for unsafe or unsound practices based on non-conformance with guidance documents cannot be ascertained from the text of the Order. Further, even if such a downgrade were determined to be a violation of the Order, the practical implications for the affected organization would likely be unclear because the Order expressly states that it does not create any private rights of action or other substantive or procedural rights or benefits enforceable by any party against the United States, its agencies, officers and employees, or other persons.
2. An agency may cite a guidance document to convey its understanding of how a statute or regulation applies to particular circumstances in an administrative enforcement action or adjudication, but only if it has notified the public of such guidance document in advance through publication in the *Federal Register* (or on the portion of the agency’s website that contains an Online Guidance Database).

### B. Fairness and Notice in Administrative Enforcement Actions, Adjudications, and Jurisdictional Determinations

1. An agency may apply only those standards of conduct that have been publicly disclosed in a manner that would not cause “unfair surprise”<sup>12</sup> in administrative enforcement actions, adjudications, or determinations that have legal consequence for a person, and it must avoid unfair surprise, not only when it imposes penalties, but also whenever it adjudges past conduct to have violated the law.
2. Any decision in an agency adjudication, administrative order, or agency document on which an agency relies to assert a new or expanded claim of jurisdiction — such as a claim to regulate a new subject matter or an explanation of a new basis for liability — must be published in the *Federal Register* (or on the portion of the agency’s website that contains an Online Guidance Database) *before* the conduct over which jurisdiction is sought occurs.
3. 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 in the *Federal Register* (or on the portion of the agency's website that contains an Online Guidance Database) and provide an explanation of its jurisdictional implications.

4. An agency may not seek judicial deference with respect 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 unless it has published the document or a notice of availability in the *Federal Register* (or on the portion of the agency's website that contains an Online Guidance Database).

### C. Opportunity to Contest Agency Determinations

1. Before an agency takes any action with respect to a particular person that has legal consequence for that person, including by issuing to such a person a no-action letter, notice of noncompliance or other similar notice, the agency must afford that person an opportunity to be heard, in person or in writing, regarding the agency's proposed legal and factual determinations. The agency must respond in writing and articulate the basis for its action.
2. Settlement negotiations, notices of a prospective legal action, or litigation before courts are not subject to the opportunity-to-contest requirement. Where necessary because of a serious threat to health, safety or other emergency or where a statute specifically authorizes proceeding without a prior opportunity to be heard, an agency is not required to comply with the requirement in the preceding paragraph but it must afford any person an opportunity to be heard, in person or in writing, regarding the agency's legal determinations and respond in writing as soon as practicable.

**D. Cooperative Information Sharing and Enforcement** – Within 270 days, each agency, as appropriate, must propose procedures to: (1) encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties; (2) encourage voluntary information sharing by regulated parties; and (3) provide pre-enforcement rulings to regulated parties. If an agency concludes that these additional procedures are not practicable (including if the agency concludes it already has adequate procedures in place), it must submit a report to the President describing the basis for its conclusion.

### E. Exceptions and Limitations

1. The Enforcement and Adjudication Order does not apply to any action that pertains to foreign or military affairs, or national or homeland security (including circumstances in which application of the Enforcement and Adjudication Order would undermine national security), nor does it apply to any action related to a criminal investigation or prosecution or any civil enforcement action or related investigation by the Department of Justice (including any action related to a civil investigative demand under 18 U.S.C. 1968). Additional exemptions are provided for internal investigations or proceedings concerning agency employees, and for certain actions relating to the protection of intellectual property rights.
2. The Enforcement and Adjudication Order does not create any private rights of action or other substantive or procedural rights or benefits enforceable by any party against the United States, its agencies, officers and employees, or other persons.

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## TAKEAWAYS

1. By its terms, the Guidance Order does not apply to independent regulatory agencies. However, these agencies may choose to align their practices to be consistent with certain aspects of the Guidance Order.
2. The Guidance Order expands the scope of OMB's review of agency guidance and grants it significant discretion in providing waivers and exemptions.

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3. Heightened requirements imposed with regard to “significant guidance documents” could discourage an agency from issuing such guidance documents as compared to traditional rulemaking.
4. The Enforcement and Adjudication Order requires each agency to propose, by July 5, 2020, procedures to (1) encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties; (2) encourage voluntary information sharing by regulated parties; and (3) provide pre-enforcement rulings to regulated parties. While certain agencies may follow guidance or past practice in encouraging the foregoing, the Enforcement and Adjudication Order will likely require many agencies to either codify existing practices or create new procedures. Additionally, agencies will have to consider what types of information sharing should be encouraged in light of potential privacy concerns.
5. In addition to the exemptive discretion afforded to OMB, the Orders include broad exceptions for certain categories of agency action. For example, a criminal investigation or prosecution, or any civil enforcement action or related investigation by the Department of Justice, is exempted under both Orders. It is unclear how broadly this exemption will apply in cases in which civil regulatory proceedings are conducted in parallel with criminal investigations.

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## ENDNOTES

- <sup>1</sup> See Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents (Oct. 9, 2019) [hereinafter Guidance Order], *available at* <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/>.
- <sup>2</sup> See Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication (Oct. 9, 2019) [hereinafter Enforcement and Adjudication Order], *available at* <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-transparency-fairness-civil-administrative-enforcement-adjudication/>.
- <sup>3</sup> Under the Orders, a “guidance document” means 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, but excluding: (i) rules promulgated pursuant to the notice and comment process; (ii) rules exempt from rulemaking requirements under relevant statutes; (iii) rules of agency organization, procedure, or practice; (iv) decisions of agency adjudications; (v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; and (vi) internal executive branch legal advice or legal opinions addressed to executive branch officials. See Guidance Order, *supra* note 1.
- <sup>4</sup> See Executive Order 12866: Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993), *available at* [https://www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf). Executive Order 12866 established a regulatory philosophy and set of regulatory principles (e.g., conducting a cost-benefit analysis), established processes for coordinating regulatory planning, and authorized the OIRA to review all significant regulatory actions.
- <sup>5</sup> See Executive Order 13563: Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011), *available at* <https://www.govinfo.gov/content/pkg/FR-2011-01-21/pdf/2011-1385.pdf> (reaffirming the philosophy and principles set forth in Executive Order 12866, promoting innovation and inter-agency coordination, and promoting retrospective analyses of existing rules).
- <sup>6</sup> See Executive Order 13609: Promoting International Regulatory Cooperation, 77 Fed. Reg. 26413 (May 4, 2012), *available at* [https://www.reginfo.gov/public/jsp/Utilities/2012-10968\\_EO13609.pdf](https://www.reginfo.gov/public/jsp/Utilities/2012-10968_EO13609.pdf) (directing agencies to consider international regulatory cooperation activities in the context of Executive Orders 12866 and 13643).
- <sup>7</sup> See Presidential Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (Feb. 3, 2017), *available at* <https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02451.pdf> (directing agencies to identify two existing regulations to be repealed for each new regulation it proposed and requiring the incremental cost of new regulations be offset by the elimination of existing costs associated with at least two prior regulations).
- <sup>8</sup> See Executive Order 13777: Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12285 (Mar. 1, 2017), *available at* <https://www.govinfo.gov/content/pkg/FR-2017-03-01/pdf/2017-04107.pdf> (directing the establishment of Regulatory Reform Task Forces at each agency to oversee the implementation of regulatory reform initiatives and to evaluate existing regulations and make recommendations regarding their repeal, replacement, or modification).
- <sup>9</sup> See Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018), *available at* <https://www.federalreserve.gov/supervisionreg/srletters/sr1805a1.pdf>.
- <sup>10</sup> See Statement Regarding SEC Staff Views (Sept. 13, 2018), *available at* <https://www.sec.gov/news/public-statement/statement-clayton-091318>.
- <sup>11</sup> Memorandum for the Heads of Executive Departments and Agencies, Guidance on Compliance with the Congressional Review Act (Apr. 11, 2019), *available at* <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf>.

ENDNOTES (CONTINUED)

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- <sup>12</sup> “Unfair surprise” means 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). Enforcement and Adjudication Order, *supra* note 2.

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**APPENDIX**

Independent Regulatory Agencies Exempt from Guidance Order<sup>1</sup>

1. The Board of Governors of the Federal Reserve System
2. The Commodity Futures Trading Commission
3. The Consumer Product Safety Commission
4. The Federal Communications Commission
5. The Federal Deposit Insurance Corporation
6. The Federal Energy Regulatory Commission
7. The Federal Housing Finance Agency
8. The Federal Maritime Commission
9. The Federal Trade Commission
10. The Interstate Commerce Commission
11. The Mine Enforcement Safety and Health Review Commission
12. The National Labor Relations Board
13. The Nuclear Regulatory Commission
14. The Occupational Safety and Health Review Commission
15. The Postal Regulatory Commission
16. The Securities and Exchange Commission
17. The Bureau of Consumer Financial Protection
18. The Office of Financial Research
19. The Office of the Comptroller of the Currency
20. Any other similar agency designated by statute as a Federal independent regulatory agency or commission

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<sup>1</sup> See 44 U.S.C. 3502(5).