

CLIENT ALERT

Potential Impact on EPA of Recent Executive Orders Addressing Agency Guidance

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On October 9, 2019, the president issued two Executive Orders (EOs), which seek to reduce reliance on informal “guidance” issued by federal agencies, including EPA and other agencies that regulate in the environmental or natural resources sphere. The intent behind these EOs is to discourage and scale back the use of guidance by agencies to achieve their regulatory aims. The practical impact of these EOs, however, remains to be seen, given that they include several substantial exceptions and allow for agencies to carve out potentially broad categories of action from their requirements.

Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents allows agencies to continue to issue interpretive guidance, but it will not be considered “binding” and must contain language so stating. The EO is carefully crafted to allow continued guidance so as long as agencies make the appropriate disclaimers about the nature of their guidance. It also requires agencies to review existing guidance to determine whether any should be rescinded within 120 days of the date on which OMB issues an implementing memorandum.

Perhaps the most important feature of EO 13891 is its treatment of “significant” guidance documents, defined as those with impacts of \$100 million or more on the economy. Significant guidance documents must be treated essentially as legislative rules, subject to notice and comment and interagency review. Notably, between the exceptions from the definition of guidance, the ambiguous definition of “significant guidance,” and potentially broad exemptions to the requirements for such guidance, the practical impact this EO is not clear, and the exceptions and exemptions could swallow much of it.

The EO also requires that agencies collect all active guidance in one location on their websites and designate a process for requesting that guidance be amended or rescinded. This aspect of the EO may be welcome to industry and environmental organizations alike in its aim to make agency views about how to interpret or apply their regulations more transparent and readily available.

Executive Order 13892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication provides additional direction on agencies’ use of guidance documents. Section 3 of the EO bars agencies from using guidance documents to impose new standards or to make a determination that has legal consequences. It provides that noncompliance with a guidance document alone will not be a regulatory violation and that an agency may cite a guidance document in enforcement actions only if it previously published it. This section might have more of an effect on agency behavior than EO 13891, although it will not necessarily stop agencies from hewing to prior guidance by characterizing their actions as based directly on the regulations or statute.

The EOs Are Not Breaking New Ground

These EOs are best viewed as part of a trend toward increasing restrictions on the use of guidance documents. The Office of Management and Budget’s 2007 Final Bulletin for Agency Good Guidance Practices could be seen as the foundation for modern guidance standards, and included the \$100 million threshold for “significant” guidance that also forms part of the recent EOs. In

2017, the Department of Justice issued what is known as the “[Brand memo](#)” on the [Prohibition on Improper Guidance Documents](#) to prevent DOJ from relying on guidance to impose legal obligations, and added corresponding language to the Justice Manual.

Practical Impacts on EPA Use of Guidance

The impact of these EOs on EPA and other agencies that regulate natural resources and protect the environment is unclear. As noted above, the EOs seem to restate what is already accepted practice at EPA: guidance documents routinely contain caveats such as “This guidance is not binding on EPA personnel, members of the regulated community, or the public.” Even assuming EPA takes to heart the renewed or restated edict not to use guidance in place of regulation, supposedly non-binding guidance, issued in accordance with the EOs, may still be prone to being applied in a practically binding manner as regulators feel compelled to make decisions based on the interpretation of the governing statute or regulations set forth in the guidance.

Broadly, these EOs will increase workloads for already understaffed EPA and Office of Management and Budget, and agencies routinely underestimate the cost of guidance, which could make the \$100 million threshold for significant guidance documents almost meaningless. In other words, agencies retain a lot of discretion as to what to do about existing guidance, and even while new “significant” guidance will be subject to more onerous procedures, the many exceptions and potential carve outs to what is “significant” may substantially blunt the practical import of those procedures. Only time will tell whether the status quo will continue for agency guidance, or the combined force of these EOs and prior documents seeking to limit the use and effect of guidance will result in meaningful and lasting change in regard to when and how agencies use guidance.

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