

# Government contracts bullet points: Federal guidance

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On October 9, 2019, President Trump signed two executive orders relating to agency guidance documents: Promoting the Rule of Law Through Improved Agency Guidance Documents<sup>1</sup> (“The Guidance EO”) and Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication<sup>2</sup> (the “Transparency EO”). Both Orders aim to limit the use, and impact, of agency guidance documents.

## BACKGROUND

Federal agencies often clarify statutory or regulatory obligations through non-binding “guidance” documents, which the Administrative Procedure Act (APA) exempts from notice-and-comment requirements. Businesses routinely ask for this guidance to help break down what are often complex and convoluted rules.

But all too often, these guidance documents shed their “non-binding” character, and effectively anchor agencies’ enforcement actions.

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They may also, as the President claimed, serve as “a back door for regulators to effectively change the laws and vastly expand their scope and reach.”

This is not the first time that the Administration has attempted to curb agency guidance. Most notably, through the “Sessions Memo”<sup>3</sup> in 2017 and the “Brand Memo”<sup>4</sup> in 2018, the Department of Justice has taken steps to do away with “binding” guidance documents, as well as limit their effect as a basis for proving violations in civil enforcement cases.

The Securities and Exchange Commission, in similar fashion, has also announced<sup>5</sup> “that all staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties.”

## THE TWO NEW EXECUTIVE ORDERS

The Guidance EO attempts to curb unchecked agency action by:

- Requiring agencies to gather all guidance documents on easily searchable websites so individuals are able to access and view them. Guidance documents not placed on the website are effectively rescinded. Each agency website must note that “guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.”
- Requiring public comment and review by the Office of Information and Regulatory Affairs (OIRA) on any “significant guidance documents.”
- Allowing the public to “ask agencies to withdraw guidance they believe is wrong,” a process that will be governed by a forthcoming OMB memorandum outlining a “withdrawal or modification” system.

The Transparency EO targets enforcement actions and other adjudications that are based on agency guidance and other non-binding documents. The Order:

- Prohibits the use of guidance documents to impose new standards of conduct (except as expressly authorized by law or incorporated into a contract). A violation of law can only be established by applying statutes or regulations.
- Prohibits reliance on a guidance document in an enforcement action to convey the agency’s understanding of a statute or regulation, unless the agency has notified the public of such document in advance through publication.
- Prohibits reliance on a decision in an agency adjudication, an administrative order, or another agency document to assert a claim to regulate a new subject matter or an explanation of a new basis for liability unless the decision, order, or other document is published.
- Requires providing the target of agency action an opportunity to be heard, in person or in writing, regarding the agency’s

proposed legal and factual determinations. This requirement does not apply to settlement negotiations between agencies and regulated parties, to notices of a prospective legal action, or to litigation before courts.

### TAKEAWAYS

It is much too early to tell whether this newest effort by the Trump Administration to curb unchecked agency rulemaking would have much (or any) practical effect.

Setting aside the welcomed requirement to gather all agency guidance documents in easily searchable locations, even under the new Orders, agencies can continue to issue “interpretive” guidance, and rely on such guidance in their various enforcement actions.

But the line that separates this “interpretative” guidance from its binding nature is often unclear. Non-binding guidance can easily turn into de facto regulation when regulators feel compelled to make decisions based on the view of the law set forth in such documents. That the Orders instruct agencies to label their guidance documents as “non-binding” does not make them so.

Even the Guidance EO’s most significant innovation — requiring notice and comment and review by OIRA for any “significant guidance documents” — may not have much of an effect in practice. The requirement does not apply to independent agencies and the definition of “significant” is vague and subject to the interpretation of OIRA.

OIRA may also establish exceptions for categories of guidance documents and determine (also categorically) which guidance documents are not significant to begin with.

OIRA and the relevant agency can also jointly create an exemption from the new procedural requirements if “exigency, safety, health, or other compelling causes” exists.

Finally, both new Orders do not apply to agency actions that pertain to a variety of subject matters, including national security, criminal investigation or prosecution, and any civil enforcement action or related investigation by the Department of Justice.

Despite the anti-guidance sentiment that the new Orders appear to reflect — in one form or another — agency guidance documents are here to stay.

### NOTES

- <sup>1</sup> <http://bit.ly/2PyvrBq>
- <sup>2</sup> <http://bit.ly/34alm1u>
- <sup>3</sup> <http://bit.ly/2Pwewvk>
- <sup>4</sup> <http://bit.ly/359PpZz>
- <sup>5</sup> <http://bit.ly/36xKJNN>

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