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New limits on agency guidance: What recent Trump executive orders may mean for financial institutions

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INTRODUCTION

On October 9, 2019, President Donald Trump signed two broad executive orders addressing regulatory guidance[1], which in part will impact the consumer financial services industry. The orders are aimed at curbing regulatory agencies' use of an Administrative Procedures Act ("APA")[2] loophole: by characterizing requirements as "guidance," agencies have long imposed obligations and limitations on regulated entities absent formal APA notice and comment.

For example, in 2013 the Consumer Financial Protection Bureau issued guidance[3] applying Regulation B's (12 C.F.R. Part 1002) disparate impact theory to indirect automobile lenders' "markup" practices. The CFPB then enforced the requirements it had stated in its guidance. In 2016, then CFPB Director Cordray warned that "...it would be 'compliance malpractice' for executives not to take careful bearings from the contents of [consent] orders about how to comply with the law and treat consumers fairly."[4]

After the Trump Administration took office, CFPB Acting Director Mick Mulvaney changed course, stating that the CFPB would no longer engage in "regulation by enforcement,"[5] and current CFPB Director Kathy Kraninger's echoed this position when she stated that "[r]egulation by enforcement certainly is pushing the envelope."[6] In September 2018, the CFPB and prudential regulators issued an interagency statement clarifying that supervisory guidance (defined to include interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions) does not have the force and effect of law, and that the agencies do not take enforcement actions based on supervisory guidance.[7]

Subsequently, President Trump issued the executive orders that this article will consider. As discussed below, the orders appear to limit agencies' ability to use existing guidance or, in many cases, to create new guidance absent APA-like notice and comment processes.

SUMMARY OF TRUMP EXECUTIVE ORDERS

Exec. Order No. 13891--"Promoting the Rule of Law Through Improved Agency Guidance Documents" ("EO 13891")--applies to guidance issued by an agency, which is generally defined as any executive department.[8] However, the term *excludes* independent regulatory agencies, including, among others, the CFPB, the Federal Reserve Board, the CFTC, the FDIC, FHFA, FTC, SEC, and OCC, and FCC.[9] As discussed below, Exec. Order 13892 on the other hand does cover all of the above agencies, and in practice it is possible the exempted financial services agencies nevertheless may elect to comply with EO 13891, consistent with the CFPB's prior "no regulation by enforcement" policy shift and statement limiting the effect of its supervisory guidance.

A guidance document is "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."[10] Although a handful of exclusions applies, the definition of guidance obviously covers a lot of agency ground.

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EO 13891 now requires agencies to maintain on their websites a single, searchable, indexed database that contains or links to all the agencies' historic guidance documents in effect.[11] Agencies must comply with this order 120 days from when the OMB issues an implementing memorandum.[12] No deadline is stated for issuance of the OMB memorandum, however. Also in that same 120-day timeframe, each agency must review its entire array of guidance documents and rescind those guidance documents that it determines should no longer be in effect.[13] Finally, within 300 days of the OMB issuing an implementing memorandum, covered agencies must develop processes for issuing any future guidance in conformity with certain requirements detailed in EO 13891.[14]

These new requirements include:

- disclosing that the guidance document does not generally bind the public;

- developing procedures for the public to petition for the withdrawal or modification of particular guidance; and

- requiring, for significant guidance documents (guidance that has an effect of at least $100 million on the economy or adversely and materially affect the economy, a sector of the economy, productivity, competition, jobs; or creates conflict with another agency's actions; or raises novel legal or policy issues with respect to legal mandates or the President's priorities[15]), an APA-like, 30-day notice and comment process; approval by the agency head; and prior review by the Office of Information and Regulatory Affairs.[16] Many guidance documents are likely to be considered significant guidance documents under the above standard. Guidance documents that are treated differently (as, perhaps, an insignificant guidance document) may be subject to challenge on process grounds.

EXEC. ORDER NO. 13892

Exec. Order No. 13892--"Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication" ("EO 13892")--applies to a broader definition of agencies, and includes the CFPB and prudential regulators.[17] EO 13892 permits an agency to cite guidance to convey its interpretation of a statute or regulation in an administrative enforcement action or adjudication *only if* the agency has notified the public of such document in advance through publication (such as in the Federal Register).[18] It prohibits agencies from using even published guidance to impose "new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract."[19]

Now when an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it *must* establish a violation of law by applying statutes or formal APA regulations. Going forward, the agency may not treat noncompliance with a standard of conduct "announced solely in a guidance document as itself a violation of applicable statutes or regulations."[20]

Accordingly, 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 prohibiting conduct, than articulate the agency's understanding or belief of how a statute or regulation applies to particular circumstances.[21] Under the APA, such guidance generally falls outside of the rulemaking requirements as an interpretation or general statement of policy.[22]

INTERPRETING AGENCY GUIDANCE

It is important to note that the executive orders do not exist in a vacuum. Prior to the signing of EO 13891 and EO 13892, the Supreme Court decided last June in *Kisor v . Wilkie*[23] that "*Auer* deference" continues to apply to agencies' interpretations of their own formal APA regulations. Premised on the idea that the agency that promulgated a regulation is in the better position to reconstruct its original meaning, current *Auer* deference requires courts to defer to an agency's interpretation of its own regulation when the regulation is truly ambiguous[24]. Agencies do not have unlimited discretion in this context, however:

- the agency's reading of the truly ambiguous regulation must fall within the bounds of reasonable interpretation;

- the regulatory interpretation must be the agency's authoritative, official position (*e.g.*, an informal memorandum summarizing a phone call between staffers was not sufficient)[25];

- the agency's interpretation must in some way implicate its substantive expertise, because the basis for deference ebbs when the subject matter of the dispute is distant from the agency's ordinary duties; and finally,

- a court should decline to defer to a convenient post hoc rationalization advanced to defend past agency action against attack, or positions that create unfair surprise[26].

PUBLICATION

Guidance, under *Auer*, that could unfairly surprise or that does not demonstrate an agency's official position should not be entitled to deference. This is one area where *Auer* and EO 13892 overlap. The executive order prevents agencies from citing unpublished guidance. So agencies must publish, on their website or in the Federal Register, any guidance conveying an official position. In turn, the published guidance will demonstrate an official position and prevent unfair surprise, satisfying several of the *Auer* criteria. If the agency fails to publish its guidance, EO 13892 prohibits the agency from using it, which arguably means it does not have the legal foundation to receive *Auer* deference by the courts in an enforcement action by that agency. Although the executive order does not bind courts, a defendant in an administrative enforcement matter could argue an agency's interpretation is not entitled to deference absent proper publication. And presumably, full *Auer* deference should not be given by the courts to agency guidance that violates the executive orders' other requirements, as discussed below.

NEW STANDARDS OF CONDUCT

EO 13892 requires agencies to establish violations of law by applying statutes or regulations, and it prohibits agencies from treating noncompliance with a standard of conduct "announced solely in a guidance document as itself a violation of applicable statutes or regulations." The prohibitions and

requirements are consistent with established black letter law, but the result may be a departure from some agencies' past practices. In principle, guidance never should support an enforcement action, as guidance does not have the force of law. Instead, enforcement actions should only stem from a statute or legislative rules, which, to be valid, must go through notice and comment[27]. In other words, "[w]hen [an] agency applies a general statement of policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued."[28] EO 13892 and the interpretive regime are in accord on these points. Guidance should do no more "than articulate the agency's understanding of how a statute or regulation applies to particular circumstances."[29]

The executive orders at their core merely restate black letter law in confirming the proper boundaries of administrative actions, and therefore they should have some lasting beneficial effect across future administrations.

However, as discussed above, EO 13892 also prohibits agencies from using guidance to impose "new standards of conduct on persons," which may have a broader scope than the adjudicative and enforcement prohibitions previously discussed. The EO does not define a "new standard of conduct," but an agency may not create one through guidance. Even prior to the EOs, however, this is how guidance was supposed to function. Guidance may interpret existing standards of conduct. It may not create enforceable standards of conduct. Consequently, it is unclear whether the "new standard of conduct" requirement has any meaning beyond affirming the previously existing framework of administrative law. This lack of clarity potentially makes the EO's application to new agency guidance subject to future litigation.

The APA requires notice and comment when agencies issue substantive rules-- *i.e.*, rules that announce standards of conduct[30]. Issuing guidance is not a formal APA rulemaking, so guidance arguably cannot impose a new standard of conduct. Guidance may only interpret existing standards of conduct. Guidance that articulated a new standard of conduct arguably should be deemed a regulation, thereby subject to formal APA notice and comment.

Again, guidance that announced new conduct requirements should not trigger deference under *Auer* because the interpretation should be understood by a court to be unreasonable and not in accordance with procedural law. In this light, EO 13892's prohibition against guidance creating new standards of conduct is merely a truism that affirms the fundamental foundation of the APA. "Guidance," under the APA, may not create enforceable, new standards of conduct; it only may elucidate. Guidance may share an agency's thinking regarding existing standards of conduct, but nothing more. Otherwise, the guidance would be elevated to the legal status of a regulation subject to formal APA notice and comment. The catch, of course, is that previous "guidance" arguably has imposed conduct requirements.

It is possible, however, that EO 13892 was intended to do more than to endorse and draw attention to the APA's existing framework. To give meaning to EO 13892's prohibition, it may be read to preclude agencies from issuing interpretive guidance describing specific conduct standards. For example, assume a creditor's dealer markup policy is a practice that may result in disparate impact as prohibited by the Equal Credit Opportunity Act's implementing regulation, Regulation B. If this is mere guidance that interprets Regulation B on this point, it would not necessarily violate the APA, and if it is reasonable and satisfies the other *Auer* factors, it arguably may receive deference.

Nevertheless, many would argue that the disparate impact guidance announced a requirement applicable to specific conduct that was not explicitly defined by the regulation. On that basis, EO 13892 may prohibit it, irrespective of how a court might use the guidance to understand the limits of disparate impact. If an agency could not lawfully draft the guidance, arguably it could not be introduced in an adjudication or enforcement matter, even if it was posted on an agency website or published in the federal register. Had the disparate impact guidance not been overturned in 2018 though the Congressional Review Act, litigation raising the executive order (assuming their eventual enactment) arguments presumably could have achieved the same end.

EO 13892's broader application to consumer financial services providers is still unclear. For example, many would argue the DOD's published guidance[31] regarding its Military Lending Act regulation improperly announced a new standard of conduct with respect to the rule's application when GAP insurance is financed. While EO 13892 exempts "any action that pertains to...military affairs,"[32] there is a good argument to be made that the DOD's guidance focusing on "financial affairs" falls outside the scope of the "military affairs" exception. Ultimately, these kinds of questions can be expected to be resolved by the courts.

CONCLUSION

Practitioners and commentators are only beginning to discern the meaning and scope of these executive orders, and their potentially profound ramifications on the financial services industry remain unclear. At a minimum, the executive orders appear to be beneficial to the industry, providing possible new and potent defenses to agency action. If the action is

premised on conduct that is described in guidance, then the subject of litigation or examination could argue that the agency impermissibly created a new standard of conduct that has no legal effect. And agencies, as a result, may decide that issuing guidance is counterproductive, that the friction between their transparency and law enforcement objectives should be resolved not through guidance but through reliance on formal rulemaking and, when necessary, initiating enforcement actions. As noted above, the executive orders at their core merely restate black letter law in confirming the proper boundaries of administrative actions, and therefore they should have some lasting beneficial effect across future administrations. Future administrations, of course, may change or rescind these executive orders, so the lifespan of direct benefits for the industry is uncertain.

POST SCRIPT

On January 27, 2020 the CFPB published a new policy[33] announcing that future compliance guidance (e.g., small entity compliance guides, instructional guides for disclosure forms, executive summaries, summaries of regulation changes, factsheets, flow charts, compliance checklists, frequently asked questions, and summary tables) will be called "Compliance Aids." The CFPB noted that Compliance Aids are not APA rules and confirmed that:

> Regulated entities are not required to comply with the Compliance Aids themselves. Regulated entities are only required to comply with the underlying rules and statutes.[34]

This policy appears to be a voluntary reaction to EO 13892--and it suggests to industry, because compliance is not required, that any Compliance Aid will not include a "new standard of conduct." However, the CFPB's guidance may "illustrate the underlying rules and statutes."[35] Although the CFPB does not intend to sanction "entities that reasonably rely on Compliance Aids,"[36] if a court gives deference to the CFPB's reasonable (and non-binding, illustrative) interpretation of a regulation--as provided in a Compliance Aid--the CFPB's non-binding guidance could still have teeth. The CFPB's policy statement, then, also may be intended to signal to the courts that Compliance Aids should not receive any deference.

Notes

[1] Exec. Order No. 13891, 84 Fed. Reg. 55235, "Promoting the Rule of Law Through Improved Agency Guidance Documents" (Oct. 9, 2019), https://www.federalregister.gov/d/2019-22623/p-1; Exec. Order No. 13892, 84 Fed. Reg. 55239, "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication" (Oct. 9, 2019), https://www.federalregister.gov/d/2019-22624/p-1.

[2] 5 U.S.C. § § 500 *et seq*.

[3] CFPB Bulletin 2013-02

[4] Prepared Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association (Mar. 9, 2016), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpbdirector-richard-cordray-at-the-consumerbankers-association/.

[5] Written Testimony of Mick Mulvaney, Acting Director, Bureau of Consumer Financial Protection, Before the House Committee on Financial Services (Apr. 10, 2018), available here https://www.consumerfinance.gov/about-us/newsroom/writtentestimony-mick-mulvaney-acting-director-beforehouse-committee-financial-services/ ("In another change, the Bureau practice of 'regulation by enforcement' has ceased. The Bureau will continue to enforce the law. That is our job, and we take it seriously. However, people will know what the rules are before the Bureau accuses them of breaking those rules.").

[6] "2019 Outlook: New CFPB Director Kraninger Will Go Her Own Way," *Bloomberg Law* (Dec. 27, 2018), https://news.bloomberglaw.com/bankinglaw/2019-outlook-new-cfpb-director-kraningerwill-go-her-own-way.

[7] Interagency Statement Clarifying the Role of Supervisory Guidance, (Sept. 11, 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/interagency-statement_role-ofsupervisory-guidance.pdf.

[8] Exec. Order No. 13891, sec. 2(a); Exec. Order No. 12866, Regulatory Planning and Review, sec. 3(b), 58 Fed. Reg. 51735 (Oct. 4, 1993), https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf; 44 U.S.C. § 3502(1).

[9] Exec. Order No. 13891, sec. 2(a); Exec. Order No. 12866, Regulatory Planning and Review, sec. 3(b), 58 Fed. Reg. 51735 (Oct. 4, 1993), https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf; 44 U.S.C. § 3502(1), (5).

[10] Exec. Order No. 13891, sec. 2(b).

[11] Exec. Order No. 13891, sec. 3(a).

[12] Exec. Order No. 13891, sec. 3(a).

[13] Exec. Order No. 13891, sec. 3(b).

[14] Exec. Order No. 13891, sec. 4.

[15] Exec. Order No. 13891, sec. 2(c).

[16] Exec. Order No. 13891, sec. 4(iii).

[17] Exec. Order No. 13892, sec. 2(a); 5 U.S.C. § § 101, 104, 105.

[18] Exec. Order No. 13892, sec. 3.

[19] Exec. Order No. 13892, sec. 3.

[20] Exec. Order No. 13892, sec. 3.

[21] Exec. Order No. 13892, sec. 3.

[22] 5 U.S.C. § 553(b)(A).

[23] *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

[24] *Id.* at 2414

[25] *Id.* at 2417

[26] *Id.* at 2421

[27] *Id.* at 2420

[28] *National Min. Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014).

[29] Exec. Order No. 13892, Sec. 3.

[30] *See* 5 U. S. C. § 553.

[31] *See* 82 Fed. Reg. 58739 (Dec. 14, 2017)

[32] Exec. Order No. 13892, sec. 11(d)(1).

[33] 85 FR 4579 (Jan. 27, 2020)

[34] *Id.*

[35] *Id.*

[36] *Id.*

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