

OMB Issues Memorandum to Federal Agencies Regarding “Best Practices” in Enforcement Actions and Adjudication

(9/27/2020)

As previously reported, on May 19, 2020 (85 Fed. Reg. 31,353 (May 22, 2020)), President Trump signed Executive Order (EO) No. [13924](#), entitled “Regulatory Relief to Support Economic Recovery.” While the EO’s focus is to combat the economic consequences of COVID-19, Section 6 of the EO contains additional requirements related to “fairness in administrative enforcement actions and adjudication” and requires federal agencies to revise their procedures and practices to ensure the same.

To assist federal agencies with the implementation of the EO's requirements related to fairness in enforcement actions and adjudications, on August 31, 2020, the Office of Management and Budget (OMB) issued a guidance [memorandum](#) providing a list of “best practices” associated with the enforcement/adjudication “principles” set forth in the EO. Examples of these “best practices” include:

- (1) Agencies should consider applying the rule of lenity in administrative investigations, enforcement actions, and adjudication by reading genuine statutory or regulatory ambiguities related to administrative violations and penalties in favor of the targeted party in enforcement.
- (2) Agency regulations should limit the duration of investigations; regulations should require investigating staff to either recommend or bring an enforcement action, or instead cease the investigation within a defined time period after its commencement absent a showing of unusual circumstances that are endorsed by an Officer of the United States, or if necessitated by good cause, by his or her designee.
- (3) A federal agency should inform a party when an investigation is closed and when the agency has made no finding of a violation.
- (4) Agency employees' performance metrics and compensation structures should incentivize excellence, accuracy, integrity, efficiency, and fairness in applying and executing the law. Performance metrics should not detract from the aim of reaching fact-based, unbiased decisions with respect to all aspects of enforcement; employees should not be rewarded on any basis that incentivizes them to bring cases or seek penalties or settlements that are meritless or unwarranted.
- (5) Agencies should establish enforcement discretion policies that decline enforcement or the imposition of a penalty, as appropriate, in the course of enforcement when the agency determines that the regulated party attempted in good faith to comply with the law.

- (6) Agencies should make the public aware of the conditions in which investigations and enforcement actions will be brought and provide the public with information on the penalties sought for common infractions.
- (7) Agencies should adopt expiration dates and/or termination criteria for consent orders, consent decrees, and settlements that are proportionate to the violation of the law that is being remedied. Decade(s)-long settlement terms that are disproportionate to the violation (s) of law should be strongly disfavored absent a clear and convincing need for time to implement a remedy such as, *e.g.*, infrastructure improvements or long-term remedial actions.
- (8) If they have not already done so, agencies should establish procedures to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties, including grace periods to cure minor violations without fear of penalty in compliance with Executive Order 13892, Section 9.
- (9) Agencies should review their adjudication procedures to ensure that liability is imposed only after notice and an opportunity to respond.
- (10) In any document initiating an investigation or enforcement action, an agency should include a citation to the statute and regulation asserted to be violated, and an explanation as to how the asserted conduct is prohibited by the cited statute and regulation, in addition to complying with Executive Order 13892, Section 3.
- (11) Agencies should ensure they have rules in place that provide parties with a reasonable period of time to respond to filings or charges brought by the agency. For example, agencies should provide parties with at least as much time to respond to an agency notice of charges as parties would have to respond to filings in civil complaints brought in federal court under the Federal Rules of Civil Procedure, unless the need for urgent action to protect the public warrants otherwise.

OMB set a compliance date of November 26, 2020, for federal agencies to implement any necessary rule changes to implement Section 6 of EO 13924. In addition, OMB requires federal agencies to implement such rule changes through notice-and-comment rulemaking. While the U.S. Environmental Protection Agency and other federal agencies are still working to conform their enforcement and adjudication procedures to comply with the EO, companies may be able to take advantage of OMB's "best practices" in ongoing or new enforcement actions. In addition, companies and trade associations should monitor EPA and other federal agency websites to ensure that their practices are modified to conform with OMB's guidance, and prepare comments on agency rulemakings to implement the practices. G&K is monitoring EPA's website and the *Federal Register* for any updates to EPA's civil penalty policies and rules of practice and procedure to implement Section 6 of the EO and will provide further updates.