



## OMB GUIDANCE ON FEDERAL ENFORCEMENT ACTIONS DEMANDS RESPECT FOR BUSINESS CIVIL LIBERTIES

by Gregory A. Brower and Carrie E. Johnson

In a little-noticed memorandum (“the Memo”) issued on August 31, 2020, by the Office of Information and Regulatory Affairs (“OIRA”) within the Office of Management and Budget (“OMB”), the Trump Administration provided new guidance to executive branch agencies, detailing best practices for enforcement actions. This guidance appears to apply to enforcement activities undertaken by a wide range of federal agencies including the Food and Drug Administration, the Securities and Exchange Commission (“SEC”), the Federal Trade Commission, and agencies within the Department of Justice (“DOJ”), among many others. Exactly how the various agencies will adopt these recommended best practices remains to be seen.

The Memo follows Executive Order 13924 (the “EO”), issued in May in response to the COVID-19 pandemic. The EO directs the “heads of all agencies” to “address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery.” The EO ordered the leadership of all federal agencies to consider “principles of fairness in administrative enforcement” and directed those agencies to revise their procedures and practices accordingly. The Memo takes the principles identified in the EO and recommends several best practices federal agencies should consider when carrying out their enforcement responsibilities. These new best practices can be summarized as follows:

(a) **Burden of Proof.** The Memo emphasizes that the Government should bear the burden of proving an alleged violation of the law. The Memo further clarifies that “members of the regulated public are not required to prove a negative to prevent liability.” Moreover, it provides that agencies should consider applying the “rule of lenity” in investigations by reading genuine statutory or regulatory ambiguities in favor of the targeted party.

(b) **Timeliness and Fairness.** The Memo states that “limiting principles” should apply to the duration of investigations, and that enforcement actions should cease within a defined time period absent unusual circumstances. The Memo further provides that when a party has been informed that it is under investigation, the Government should inform the party when the investigation is closed, and should confirm the finding of no violation of the law when that is the result of the investigation. According to the Memo, government employees should not be rewarded on any basis that incentivizes them to bring cases or seek penalties or settlements that are not warranted.

(c) **Independence of Agency Adjudicators.** The Memo suggests that agency adjudicators should operate independently from investigators and enforcement staff, and advises against pay structures for adjudicators that link compensation to the penalties they impose.

(d) **Exculpatory Evidence.** The Memo directs agencies to provide favorable relevant evidence in the agency’s possession to the target of the enforcement action. The Memo specifically cites to *Brady v. Maryland*, 373 U.S. 83 (1963), and other case law, as well as the DOJ’s “Justice Manual,” as guidance for the disclosure of exculpatory evidence in such actions. Likewise, the Memo recommends that agencies should automatically disclose evidence material to the mitigation of damages or penalties, consistent with *Brady*.

(e) **Rules of Evidence.** The Memo advises agencies to adopt or amend regulations regarding evidence and procedure to “eliminate any unfair prejudice, reduce undue delay, avoid the needless presentation of cumulative

---

**Gregory A. Brower** is a Shareholder with Brownstein Hyatt Farber Schreck LLP in the firm’s Las Vegas, NV and Washington, DC offices, and **Carrie E. Johnson** is a Shareholder in the firm’s Denver, CO office.

evidence, and promote efficiency.” The Memo also counsels agencies to adopt the Federal Rules of Evidence, and to authorize regulated parties to be represented by legal counsel.

(f) **Penalties.** The Memo clarifies that penalties should be “proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law,” and that agencies should establish enforcement discretion policies that decline enforcement or the imposition of a penalty, as appropriate, when the agency determines that the regulated party attempted in good faith to comply with the law.

(g) **Improper Coercion.** Enforcement actions should be “free of improper Government coercion,” and specifically states that “retaliatory or punitive motives, or the desire to compel capitulation, should not form the basis for an agency’s selection of targets for investigations or enforcement actions.” The Memo instructs that in order to prevent improper motives from influencing agency decisions, an agency should not initiate additional investigations of a target absent a showing of good cause that is reviewed by “an Officer of the United States, except when the additional investigation is prompted by facts uncovered in the initial investigation.”

(h) **Due Process.** The Memo provides that liability should be imposed for violations only after reasonable notice and due process, which includes fair procedures for adjudication. Moreover, information obtained in an enforcement action should only be shared with DOJ or other criminal investigative authority in a manner that is consistent with both the law and with policies and guidelines regarding parallel investigations.

(i) **Fairness.** The Memo makes clear that enforcement actions should be free of unfair surprise, meaning that, among other things, agencies should ensure they adopt procedures that ensure parties are provided with reasonable notice of the allegations against them, and have adequate time to respond.

(j) **Accountability.** In addition to existing statutory requirements, the Memo advises agencies to adopt additional requirements for the approval of the initiation of enforcement actions.

While these best practices may seem obvious, anyone who has ever represented a client in the context of a federal enforcement action will welcome the Administration’s acknowledgment that basic concepts of fundamental fairness and due process can too often get lost in the zealotry with which many agencies pursue enforcement actions. However, it is not yet clear whether the various agencies will formally adopt these best practices. Some will no doubt receive the Memo as mere recommendations that are largely being followed already and that lack the force of law. The more interesting question is *whether* and *how* targets of DOJ criminal investigations leverage the Memo.

While Section 6 of the EO directs “heads of all agencies” to “consider the principles of fairness in administrative enforcement and adjudication,” it is unclear whether the Memo applies to the executive branch more generally. Most critically, the fact that the Memo is addressed to “THE DEPUTY SECRETARIES OF EXECUTIVE DEPARTMENTS AND AGENCIES” suggests that the Deputy Attorney General received the Memo and that the White House expects the DOJ to be subject to the Memo’s requirements. Even if OMB intended for the Memo to apply to administrative enforcement actions by DOJ agencies such as the Drug Enforcement Administration, and not traditional DOJ criminal investigations, it seems only fair that the DOJ nevertheless should follow the Memo’s guidance in the context of all investigations. Indeed, if, as the Trump Administration suggests, it is important that administrative enforcement actions be conducted in a way that focuses on fundamental fairness, it arguably is even more important that the DOJ conduct criminal investigations in accordance with these same best practices.

It likewise is unclear whether the EO will have any practical impact on many agencies and their enforcement actions due to the limits of OMB’s and the White House’s control. For example, unlike the DOJ, the SEC is not an executive branch agency, but rather an independent agency that operates autonomously from presidential control. For the SEC and other independent agencies, Executive Orders and guidance issued thereunder do not carry the force of law and at most serve as optional recommendations. Thus, agencies like the SEC may elect to disregard it all together, or to implement some recommendations internally but without issuing any new rules.

Whatever the ultimate impact of the Memo on actual government investigations going forward, it is refreshing to see the executive branch at least acknowledge that basic principles of fairness and due process should apply to the enforcement of federal laws and regulations.