

White House Due Process Memo Could Reform Enforcement

By **Joan Meyer and Norman Bloch**

On Aug. 31, the White House issued a remarkable yet little-noticed memorandum that, if followed, has the potential to revolutionize the way justice is carried out in civil and administrative enforcement proceedings at federal agencies.[1]

The memorandum directs agencies to provide much greater due process to individuals and companies investigated by these agencies and reinforces the principle that the burden of proof of a violation is on the government — it is not up to those investigated to prove compliance. The memorandum also addresses specific procedural and substantive revisions to civil and administrative proceedings that are long overdue.

Even though civil enforcement does not carry the severe penalties that a criminal prosecution can impose, these prosecutions are serious. Many of these agencies have the power to impose extremely punitive sanctions, including lifetime industry bans and onerous civil monetary penalties, in their enforcement proceedings.

Although the executive order is ostensibly tied to the coronavirus pandemic and the Trump administration's efforts at economic recovery, the implementation guidelines in the M-20-31 memorandum aim to do much more than ameliorate the economic downturn.

The executive order generally directed agency heads to "consider the principles of fairness in administrative enforcement and adjudication" and "revise [agency] procedures and practices in light of them, consistent with applicable law and as they deem appropriate in the context of particular statutory and regulatory programs and the policy considerations identified in section one of the order."

But the memorandum does not just contain generalities; it gives specific and detailed guidance as to how the executive branch expects enforcement cases of all stripes to be handled going forward.

Agencies Subject to the Memorandum

Pursuant to the executive order and the memorandum, the guidance appears to apply to all federal government departments and agencies. Accordingly, any federal agency, such as the U.S. Securities and Exchange Commission, the U.S. Commodity Futures Trading Commission, the Federal Trade Commission, the Federal Reserve Board and other banking regulators, the Consumer Financial Protection Bureau, the U.S. Environmental Protection Agency — any agency with civil or administrative enforcement authority — would be subject to this implementation directive.

Since agencies have very different customs and practices in enforcing their authority, this is an ambitious, and badly needed, plan to create a level of consistency and fairness in enforcement actions throughout the federal government that extends far beyond the goal of providing economic relief during the pandemic.



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Burden of Proof

First and foremost, the memorandum directs that in any enforcement action — civil or administrative — it is the government's burden to prove an alleged violation of law and any subject of enforcement should not bear the burden of proving compliance. It goes on to state that a subject should not be required to "prove a negative" to avoid liability and enforcement consequences in the absence of statutory standards requiring otherwise.

Although the memorandum specifically excludes application to recipients of government benefits who must demonstrate eligibility to receive government funds, the general principle will have widespread ramifications for federal agencies that do not operate under clear statutory standards and regulations and that allow their enforcement divisions to pursue cases based on novel or unproven legal theories.

The government should not be allowed to bring a case against a subject based on what it thinks should have been done, but rather should bring an action based on actual misconduct that violated a specific statute or regulation under the agency's jurisdiction.

As a corollary to that principle, agencies and their administrative law judges should consider applying the rule of lenity in administrative investigations, enforcement actions and adjudication by reading regulatory ambiguities in favor of the subject.

The rule of lenity or rule of strict construction has long required courts to resolve ambiguities in statutory construction against the government and in favor of a criminal defendant. It is one of the hallmarks of modern jurisprudence and protects defendants from penalties based on a violation of law that was arguably subject to varying interpretations.

The fact that the current administration now directs federal agencies to consider application of the rule of lenity in administrative and civil actions is long overdue and necessary. The increasingly complex web of overlapping and contradictory agency regulations and guidance, especially in industries like health care, securities and financial services, has created much more uncertainty in the business community today.

If civil prosecutors, administrative law judges and hearing officers are required to resolve a lack of clarity in favor of an enforcement subject, the burden will fall on those regulators to clarify and streamline their regulations and procedures before proceeding, rather than imposing that burden on a case-by-case basis on subjects, who often can make numerous requests to the regulating agency to determine why they are being investigated.

In addition, the application of the rule of lenity may force agencies to use their rulemaking procedures to promulgate clearer rules and regulations.

Due Process in Administrative Proceedings

The memorandum requires changes, possibly radical ones, in how federal agencies are bringing administrative proceedings against their subjects.

Federal agencies have long been able to control how their own administrative proceedings were conducted, including preventing the public from accessing an administrative court's docket, limiting discovery to effectively prevent subjects from presenting evidence relevant to their defense, asserting attorney-client privilege over investigative records related to the subject's case, withholding exculpatory evidence in the government's possession, and causing undue delay in investigations because of cumbersome decision-making procedures

within an agency that prevent the timely filing of a proposed action.

The memorandum states that administrative enforcement should be prompt and fair and provides specific instructions to ensure that result.

Government enforcement attorneys are directed to seek approval of an officer of the United States or designee with good cause before entering into a tolling agreement to extend the statute of limitations. An "officer of the United States," as that term is referenced in the appointments clause of the U.S. Constitution, includes both so-called principal officers, such as a cabinet secretary or federal judge nominated by the president and confirmed by the Senate, and "inferior" officers who are appointed by the president or the head of a department but are not approved through Senate confirmation.

Agencies are further cautioned to limit the duration of an investigation by creating regulations that require an investigation to end with action or a declination within a defined time period, absent unusual circumstances. These directives are clearly aimed at preventing administrative agencies from bringing enforcement actions years after a purported violation occurred or engaging in prolonged investigations of subjects that can feel more like harassment or fishing expeditions to find a violation rather than a targeted review of a suspected violation.

Moreover, the memorandum directs that subjects be expressly told by the agency that an investigation has been closed and, if applicable, that a finding of no violation has been made. This requirement would ameliorate the strain companies and their employees are often under when the government has launched a resource-draining investigation followed by a long period of silence.

Under these circumstances, subjects are often counseled by their lawyers to wait a few years before they can finally conclude that they will not be prosecuted. This guidance gives certainty that there will be a prompt end to an inconclusive fact-gathering process.

The memorandum also directs agencies to develop regulations governing evidence and adjudicatory procedure in order to eliminate unfair prejudice, avoid the presentation of cumulative evidence and promote efficiency. Agencies are also told to reduce the use of hearsay evidence with limited exceptions and consider incorporating other standards set forth in the Federal Rules of Evidence.

This instruction will change how many agencies try cases. Administrative judges have often allowed the unrestrained use of hearsay evidence, which, combined with a limited opportunity for discovery to provide proper context surrounding the hearsay, effectively has inhibited respondents in an enforcement action from fully defending against the charges.

One of the most important changes contained in the memorandum is the instruction that administrative agencies should conform their civil adjudicatory evidence disclosure practices to *Brady v. Maryland* and *Giglio v. United States*.^[2]

These seminal criminal cases have long required the government to disclose material exculpatory evidence to a defendant, even that which bears on the credibility of government witnesses. Agencies have argued in the past that their civil prosecutors are not subject to these disclosure practices and have used agency confidentiality rules, attorney-client privilege and exemptions under the Freedom of Information Act to prevent the production of relevant, exculpatory materials.

This change would provide welcome relief and promote fairness to those who must respond to often protracted investigations and follow-on enforcement litigation. Unlike a private plaintiff engaging in garden-variety civil litigation against another private party, a federal agency uses the resources of the government to take punitive action against respondents to ban them from their chosen profession and/or levy significant financial penalties.

In taking these extreme steps, it is only fair that agencies be transparent and provide a complete investigatory record to their enforcement targets. All federal agencies are now instructed to follow the procedures set forth by the U.S. Department of Justice in disclosing material exculpatory evidence, including any evidence that would be material to the mitigation of civil damages or penalties.

Internal Agency Influence

The memorandum directs federal agencies to take appropriate steps to ensure that their internal processes, from administrative recommendation to appeal, are free from improper influence. Some agencies' structures are opaque and it is difficult to determine how enforcement and adjudicatory arms interact.

Agencies are now instructed to base employee performance metrics on accuracy, integrity and fairness rather than on any basis that provides an incentive to bring cases and penalties that are meritless or unwarranted. In addition, agency adjudicators, hearing officers, administrative law judges or appellate bodies, such as a federal agency's board or commission, are told not to engage in ex parte communication with investigators and enforcement staff.

In agencies where enforcement staff regularly mingle with advisory attorneys working for judges, hearing officers or commissioners, this directive is significant. Agencies are told to develop reporting procedures and command structures that ensure improper communication does not take place between their enforcement and adjudicatory functions. Presumably, violations could be reported to the pertinent agency inspector general or, in the case of the DOJ, the Office of Professional Responsibility.

Required Notice

The memorandum underscores how important it is for the subjects of enforcement actions to be given notice and an opportunity to respond to charges proposed against them. Agencies are told to initiate charges by citing the relevant statutes or regulations that are violated and provide an explanation of the conduct violative of the cited provisions. This is standard practice in federal and state courts, but unfortunately pleading requirements in administrative proceedings vary from agency to agency.

Agencies have even taken the position that the conduct cited in a complaint is merely illustrative and does not preclude enforcement counsel from introducing evidence of other violations that are not specifically described. Requiring conformity with widely accepted standards of pleading fairness is a necessity for a fair and just administrative process.

The memorandum also directs agencies to create procedures to make preenforcement rulings available and to provide a fair amount of time to respond to charges, at least as much time as parties would have to respond to civil complaints filed in federal court.

Conclusion

For the companies and individuals operating in regulated industries that are, or may be, the subject of a federal enforcement action, the M-20-31 memorandum represents a sea change in the often inscrutable practices of federal departments and agencies that resist transparency and accountability, even in their adjudicatory processes. By making some basic revisions in the name of fairness, both the government and those it regulates will be better served.

Basic concepts such as notice pleading, prevention of undue delay in bringing charges, production of exculpatory evidence, and limited use of hearsay need to be an integral part of any federal administrative process. This guidance not only provides greater due process to those targeted by agency regulators, it also brings greater credibility to the agency itself when those who are regulated believe they have a fair shot at being heard.

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[1] The memorandum followed the president's Executive Order 13924, Executive Order on Regulatory Relief to Support Economic Recovery, and is characterized an implementation memorandum for a section of that executive order.

[2] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972).