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Is COVID-19 Guidance a Sword or Shield in Regulatory Enforcement and Litigation?

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COMMENTARY
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Is COVID-19 Guidance a Sword or Shield in Regulatory Enforcement and Litigation?

IN SHORT

The Issue: Federal agencies have issued subregulatory guidance affecting every industry during the COVID-19 pandemic.

The Situation: The federal government has issued executive orders and memoranda on the proper role of guidance and clarifying that a violation of a guidance document cannot serve as the basis for an enforcement action.

Looking Ahead: While the government has prohibited agencies from using guidance as a sword, guidance issued during COVID-19 can be used as a shield to defend against regulatory enforcement and litigation.

Agency Guidance Issued During COVID-19 Affects Every Industry

COVID-19 has unleashed a flurry of agency guidance. Given the virus's economic impact, federal regulators have decided the need for speed trumps the benefits of formal decision-making.

Every industry has been impacted by guidance issued during the COVID-19 pandemic. For example, the White House released guidance on reopening America. The Department of Homeland Security issued guidance on which critical infrastructure sectors should remain open. The CDC issued guidance on maintaining healthy work environments and reopening workplaces. OSHA released guidance on preparing workplaces for COVID-19. The EEOC has guidance on pandemic preparedness in the workplace. The FDA issued COVID-19 guidance for health care providers on many topics. And nearly every day the Department of the Treasury and Small Business Administration issue new guidance on the Paycheck Protection Program.

Businesses need to be mindful of the ways in which this guidance can impact regulatory enforcement and litigation. Guidance can have a coercive impact on an entire industry. Federal agencies can allege violations of guidance in regulatory enforcement actions. And plaintiffs can file lawsuits alleging that businesses failed to comply with federal agency guidance.



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Presidential Executive Orders Prohibit Agencies From Using Guidance as a Sword

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The President issued two executive orders limiting agencies' ability to use guidance for policymaking and civil enforcement. See Jones Day's *Alert*, "[White House Executive Orders Limit Federal Agencies' Civil Enforcement Tools](#)." The President announced that "guidance documents may not be used to impose new standards of conduct" absent some other legal basis. Nor may an agency "treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations."

Many agencies have issued internal memoranda clarifying the role of guidance. These include the financial regulators—including the Federal Reserve, FDIC, OCC, CFPB, Treasury, and SEC—and the Departments of Transportation and Health and Human Services. Similarly, the Department of Justice has limited the use of other agencies' guidance documents in civil enforcement actions. See Jones Day's *Alert*, "[DOJ Limits the Use of Agencies' Guidance Documents in Civil Enforcement Actions](#)."

Yet some of the guidance issued during the COVID-19 pandemic appears to be in tension with the President's executive orders. Businesses affected by improper agency guidance issued during the COVID-19 pandemic should remember that executive orders limit the ability of agencies to use guidance as a sword in regulatory enforcement and litigation.

Guidance Can Provide a Shield in Regulatory Enforcement and Litigation

The increased use of guidance during the COVID-19 pandemic also makes it critical for businesses to understand how to use agency guidance to defend against regulatory enforcement and litigation.

Many businesses will face lawsuits from plaintiffs claiming violations of an alleged duty of care during COVID-19. Complying with applicable guidance will help businesses demonstrate that they met the alleged duty of care. Guidance can thus protect businesses from after-the-fact second-guessing and litigation exposure.

Likewise, many businesses will face regulatory enforcement actions involving guidance issued during COVID-19. Here, too, complying with applicable guidance can help protect against regulatory second-guessing. Businesses that comply with an agency's guidance document may be able to show that they would suffer unfair surprise if the agency changed the rules in an enforcement proceeding. Per the text of the executive order, an agency "must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law."

Complying with federal guidance could be even more beneficial in the future. Congress is reportedly considering legislation granting liability protections to businesses that comply with federal guidance during the COVID-19 pandemic. Businesses should thus carefully consider the impact that complying with guidance can have on their future liability and litigation risk.

For more information, listen to the Jones Day webinar, "[What In-House Counsel Need to Know About Agency Guidance](#)."

THREE KEY TAKEAWAYS

1. Federal agencies increasingly regulate through guidance during the COVID-19 pandemic.
2. Presidential executive orders and agency memoranda prohibit federal agencies from using guidance as a sword in regulatory enforcement and litigation because guidance cannot serve as the basis for an enforcement action.
3. Guidance can be a shield against litigation and regulatory enforcement actions for businesses that comply with agency guidance.



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