

White House Memo Emphasizes Ideals of Fairness in Civil Investigations Conducted by Federal Agencies

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On Aug. 31, 2020, President Donald Trump issued a Memorandum (the “Memo”) to all secretaries of executive departments and agencies concerning the implementation of Section 6 of Executive Order 13924, *Executive Order on Regulatory Relief to Support Economic Recovery*, which was issued in May of this year (the “Order”). This section directs the heads of federal agencies to “consider the principles of fairness in administrative enforcement and adjudication” and to “revise their 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 1 of [the Order].”

With a few caveats, the Memo suggests a list of “best practices” for federal agencies to follow concerning the investigation of corporate compliance with regulatory programs. Below are several guidelines that stand out, especially for corporations striving to comply with federal regulations and avoid civil penalties:

BURDEN OF PROOF

1. The government bears the burden of proving an alleged violation of law, with the Memo specifically emphasizing that “the subject of enforcement should not bear the burden of proving compliance” with any laws or regulations.
2. All statutory or regulatory ambiguities should be interpreted “in favor of the targeted party in enforcement,” in line with the Rule of Lenity.

FAIRNESS

3. Enforcement of regulations should be “prompt and fair.”
 1. Agencies should not extend the statute of limitations for an infraction without getting approval of a government officer or a designee.
 2. Agencies should limit the duration of investigations unless unusual circumstances exist and an extension is approved by a government officer or a designee.
 3. Agencies should inform a party under investigation when the investigation has been closed and when no violation has been found.

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4. Agencies should get only one attempt to bring an enforcement act against a possible violation, and should not try repeatedly to find different violations that fit the same set of facts.
 5. Agency employees should not be rewarded for bringing certain cases or seeking certain penalties “that are meritless or unwarranted.”
4. The Government should provide any “favorable relevant evidence in possession of the agency” to the parties being investigated, including all exculpatory evidence and evidence favorable to the mitigation of damages or penalties.
5. Agencies should explicitly say that parties under investigation are entitled to legal counsel. They should also take steps to aid individuals who are not represented by legal counsel, including by writing the rules of evidence and procedure in plain language.
6. Any penalty should be “proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.”
1. Agencies should reduce penalties when they determine the regulated party tried in good faith to comply with the law.
 2. Agencies should make the public aware of common infractions and corresponding penalties.
 3. Agencies should establish and encourage voluntary self-reporting of violations “in exchange for reductions or waives of civil penalties, including grace period to cure minor violations without fear of penalty.”
7. Agencies’ motives in investigating a party should not be retaliatory or punitive.

DUE PROCESS

8. Agencies should not penalize a party without providing notice to the party and giving them an opportunity to respond.

While it is unclear how many of these suggestions federal agencies will apply, the issuance of this Memo signals a shift, at least in thinking if not practice, in how civil and administrative enforcement proceedings at federal agencies should be carried out. If nothing more, it provides some basis for contesting an agency’s contrary actions in future investigations.

PEOPLE

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