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Publications

Two New Executive Orders Promise to Impact Retirement and Health Plan Guidance

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On October 9, 2019, President Trump signed two executive orders that will likely impact the guidance and enforcement actions we will see from the Trump Administration in the retirement and health arenas. The first is an Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents ("Guidance EO")[1] and the second is an Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication ("Enforcement EO")(collectively, "Executive Orders").[2] The Executive Orders build on recent memoranda adopted by individual executive agencies. These agency memoranda generally limit sub-regulatory guidance with the force and effect of law and signal that agencies should not bring enforcement actions absent an act violating a regulation that was subject to notice and comment or the text of a statute.

The Executive Orders have the potential to materially impact how the Department of Labor's Employee Benefit Security Administration ("EBSA"), the Department of the Treasury ("Treasury"), the Internal Revenue Service ("IRS"), and other agencies regulate retirement and health plans. Over the years, the agencies have relied heavily on the issuance of sub-regulatory guidance (*e.g.*, Advisory Opinions, Field Assistance Bulletins, Revenue Rulings, Notices, and settlement agreements) and enforcement to regulate, insurers, third party administrators, plan sponsors and service providers. Although the Executive Orders do not end this practice, they do impose significant restraints and procedural requirements that could impact key enforcement initiatives, including EBSA's activities related to missing participants.

Background

Since President Trump's inauguration in 2017, the Administration has taken a number of steps to deregulate various industries and curtail executive action perceived as overreaching. The Administration has also taken action to implement procedural restrictions to implementing guidance, particularly from Treasury and the IRS. The Executive Orders build on those efforts by establishing administration-wide guidance placing limits on agencies' latitude to issue guidance and engage in enforcement.

The Executive Orders are consistent with a Department of Justice ("DOJ") memorandum from November 16, 2017, that announced an administration-wide policy against issuing guidance documents "that purport to create rights or obligations binding on persons or entities outside the Executive Branch."[3] The DOJ expanded its stance in early 2018 by limiting itself from using enforcement actions to convert agency guidance into binding rules.[4] For the DOJ, guidance documents themselves can no longer provide the basis for proving violations of applicable law.

Other agencies, including the Treasury Department, the IRS, and the key financial institution regulators, have similarly adopted the DOJ's position and also self-imposed limitations on the use of non-regulatory guidance.[5] The Department of Treasury's Policy Statement adopted on March 5, 2019, reiterates that sub-regulatory guidance does not have the effect of law and cannot be used to modify existing legislative or regulatory rules. However, the Department of Labor did not issue a similar policy statement.

Review of Rule of Law and Guidance Document Requirements

The Executive Orders attempt to achieve two key objectives. First, the Guidance EO seeks to put constraints on agencies' ability to issue binding sub-regulatory guidance. Second, the Enforcement EO then creates new rules for agencies' enforcement intended to make the administrative process more fair and transparent. Together, the Executive Orders could have a significant impact on agencies' regulatory and enforcement activities, at least for the remainder of the Trump Administration.

The Guidance EO adopts the policy that "[a]gencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract." It defines "guidance documents" broadly as "an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation," but not including rules promulgated pursuant to notice and comment rulemaking and certain other rules, decisions and internal guidance.

The Guidance EO imposes new procedural requirements on all agencies issuing certain types of guidance documents. Notably, existing sub-regulatory guidance must undergo review by the Office of Management and Budget ("OMB").[6] Further, any guidance document that an agency seeks to have remain in effect will need to be included in a single, searchable and indexed database on that agency's website. Agencies are also required to amend or finalize regulations that set forth procedures for issuing guidance documents themselves.

These guidance document procedures appear intended to function similarly to the Administrative Procedure Act rules designed to provide the public with an opportunity to comment before new rules take effect. For example, the Executive Orders require at least 30 days of public comment on "significant guidance documents" and a public response by the agency to major concerns raised in comments, and approval by an agency head before guidance documents can take effect.

As a result of the Guidance EO, the public will likely have a greater opportunity to petition an agency for changes to or the removal of a particular guidance document while the regulatory agencies will have less opportunity to respond to stakeholders by way of sub-regulatory guidance (which is generally not subject to notice and comment under the Administrative Procedure Act). Notably, the new procedural requirements for significant guidance documents do not appear to apply to written agency responses to inquiries concerning compliance. That likely includes EBSA advisory opinions, IRS private letter rulings, and non-enforcement letters issued by the Securities and Exchange Commission.

The Enforcement EO requires agencies, when taking administrative enforcement actions or engaging in adjudication, to "establish a violation of law by applying statutes or regulations." An agency can only apply standards of conduct that have been publicly stated in a manner that would not cause "unfair surprise." The Enforcement EO defines an unfair surprise to include an agency position or policy that does not provide reasonable certainty or fair warning of what legal standard the agency required. Further, an agency must publish a guidance document in advance in the Federal Register or in the searchable database on the agency's website if it wishes to cite the document for the legal applicability of a statute or regulation in an enforcement action or adjudication. To the extent that a document arises out of litigation, an agency must also explain the implications of that document when it is published.

Perhaps most importantly, an agency must give a private party the opportunity to be heard and contest the agency's findings *before* an agency takes any action that may have legal consequences for that party. The Enforcement EO further requires that agencies establish procedures for administrative inspections and that any information request pursuant to an investigation display a control number assigned by the OMB. Lastly, each agency must propose procedures for "cooperative information sharing and enforcement," including those to encourage self-reporting in exchange for reduced penalties and to provide for pre-enforcement rulings.

Impact on Retirement and Health Regulation

Although the new Executive Orders establish many rules, how those rules will function in practice is unclear. The rules may affect agency enforcement in circumstances where there are due process concerns. In the benefits context, it will be interesting to watch whether EBSA shifts its enforcement priorities to align with the policy of the Executive Orders. For example, in the past, EBSA has conducted certain enforcement activities related to both retirement and health plans where there is a lack of formal guidance or the enforcement action seeks to enforce informal sub-regulatory guidance, such as an FAQ.

In other areas, the Executive Orders may well prove counterproductive. For example, some regulated parties may find that agencies are less willing to provide clarifications or guidance on technical issues (*e.g.*, Field Assistance Bulletins) hampering market innovation. Private Letter Rulings and Advisory Opinions appear to be unaffected by the Executive Orders. Nevertheless, there is a risk that all agency pronouncements will move more slowly if agencies are forced to show that the benefits of their sub-regulatory pronouncements outweigh their costs.

As a final point, executive orders remain in effect only so long as the President elects to retain them. Executive orders are routinely reevaluated by new Presidents, and a subsequent administration could rescind, modify, or reinterpret the Trump Administration's Executive Orders.