

## White House Memo Directs Federal Agencies to Issue Rules on Fairness in Administrative Enforcement and Adjudication

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On August 31, 2020, the White House issued a memo (the Memo) directing federal agencies to, among other things, “consider the principles of fairness in administrative enforcement and adjudication.”<sup>1</sup> The Memo, issued by the Office of Information and Regulatory Affairs (OIRA), prescribes “best practices” for agencies in interpreting Section 6 of Executive Order 13924, signed by the President on May 19, 2020,<sup>2</sup> and directs agencies to coordinate with OIRA staff to issue any needed federal rules to implement these principles by November 26, 2020 (absent a waiver granted by the administrator).

The Memo instructs agencies to consider several principles in reviewing their policies and enforcement practices, including, among other things, that the government bear the burden of proving an alleged violation of law, rather than the subject of enforcement bearing the burden of proving compliance. The Memo suggests that agencies “consider applying the rule of lenity in administrative investigations, enforcement actions, and adjudication” by resolving any ambiguities in statutes or regulations in favor of the targeted party in enforcement.<sup>3</sup> The Memo also states enforcement should be “prompt and fair” by, among other things, (i) seeking approval from an officer of the United States before entering into a tolling agreement, and

(ii) eliminating multiple actions for a single set of facts, ensuring an agency have “only one bite at the apple to investigate.”<sup>4</sup> The Memo also advises that agency adjudicators should not engage in *ex parte* communications with investigations and enforcement staff.

It is an open question as to whether the Memo will have any impact on independent federal agencies, such as the U.S. Securities and Exchange Commission (SEC) or Commodity Futures Trading Commission (CFTC), as the White House does not have the authority to direct rulemaking with respect to those agencies.<sup>5</sup> Nor are we aware of any guidance issued by the SEC or CFTC with respect to whether and how the Memo will be interpreted. Furthermore, given that the elections will take place on November 3rd, prior to the November 26th deadline for implementing rules, we suspect that most agencies will wait until after the outcome of the election before issuing guidance. Nevertheless, individuals and entities that are subject to agency investigations or enforcement proceedings may wish to raise the Memo with agency staff in an effort to negotiate a more favorable resolution.

<sup>1</sup> The Memo (M-20-31) is available at <https://www.whitehouse.gov/wp-content/uploads/2020/08/M-20-31.pdf>.

<sup>2</sup> Section 6 of Executive Order 13924 directs heads of 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 [...] this order.”

<sup>3</sup> Memo M-20-31 at p. 2.

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Caroline Bradley, “Consultation and Legitimacy in Transnational Standard-Setting,” 20 *Minn. J. Int’l L.* 480, 512, fn. 83 (2011) (noting that “the Securities and Exchange Commission (SEC) and the Commodities and Futures Trading Commission (CFTC) [...] have extensive rule making powers exercised independently of the executive.”).

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