



The Daily Dish

Trump Dives Into the Regulatory Weeds

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Eakinomics: Trump Dives Into the Regulatory Weeds

For a president often criticized for not being interested in facts, details, and analysis, President Trump took a serious dive into the regulatory weeds Wednesday. Did he talk about Proposed Rulemaking? Advance Notice of Proposed Rulemaking? Comments and comment periods? No. He issued two executive orders (EOs) on the topic of regulatory “guidance” documents. Per AAF’s Dan Bosch — his complete analysis is [here](#) — “Guidance documents are communications from regulatory agencies that help to clarify the obligations of regulated entities.” In this regard, guidance can be good news for the regulated, as it provides clarity and come certainty about their compliance efforts.

That’s the official line, anyway. The reality is a bit grimmer. Guidance documents do not go through the usual regulatory process; in particular, the public cannot comment on guidance. As a result, agencies can easily use memos, letters, blog posts, and even (see below) pictures to assert more authority than the underlying regulation specifies. If that was where it stopped, fine. But unfortunately agencies have undertaken enforcement actions against those who did not comply with the guidance, and, worse, the courts have upheld those enforcements, creating a vague, looming threat around all guidance. Bosch notes: “As an example, in 2017 the Food and Drug Administration (FDA) issued a guidance document, rather than further regulatory code changes, regarding its menu labeling rule. This document showed images of compliant and non-compliant establishments. Though no enforcement actions have been taken, one could envision how a court could rule in favor of the FDA if it penalized an establishment that labeled their menu in some fashion not exactly mirroring the guidance document.” And, if that is not unattractive enough, there is no repository of guidance documents, and there is no transparency about when they are being issued.

The president issued EOs on two fronts. The first, “[Promoting the Rule of Law Through Improved Agency Guidance Documents](#),” requires federal agencies to establish a repository page on their website where all the guidance documents can be found, invalidates any guidance document not found on the issuing agency’s website, and requires the agency to allow the public 30 days to comment on major guidance before it is finalized. The result will be a process that is far less murky and one-sided.

The second, “[Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication](#),” is intended to prevent “unfair surprise” enforcement actions based on guidance documents. How effective this will be, in turn, depends on the forthcoming implementing rule, so stay tuned.

The relationship between regulators and the private sector can be expected to be prickly, at best. But it should not be one-sided. These two EOs may bring a big improvement in the regulatory process.