

COVID-19 Regulatory Update

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New Executive Order Calls for Greater Regulatory Flexibility, Compliance Assistance and Enforcement Discretion for Businesses

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On May 19, 2020, President Trump signed an Executive Order entitled “Regulatory Relief to Support Economic Recovery.” The Order calls on agencies to provide or extend regulatory flexibilities that promote job creation and economic growth, and provide regulatory relief to businesses as they work to recover from the impact of the coronavirus. The Order also reinforces the agencies’ obligations to be transparent and fair in administrative enforcement actions. Below are three things to expect in response to [Executive Order 13924](#):

1. Agencies are expected to identify and report on which temporary, COVID-19 related policies should be made permanent

The Order calls on agencies to grant regulatory flexibility to help promote economic growth. Agencies are directed to “use, to the fullest extent possible and consistent with applicable law” their emergency authorities “to support the economic response to the COVID-19 outbreak.” Order § 3. Agencies are further directed to consider “rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery,” or exercise “appropriate temporary enforcement discretion” with respect to violations of such standards. Order §§ 1, 4.

Section 7 of the Order directs agency heads to review any regulatory flexibilities that have been implemented in response to COVID-19, whether before or after issuance of the Order, and “determine which, if any, would promote economic recovery if made permanent.” Agencies are then to prepare a report on their determinations to the Director of the Office of Management and Budget, the Assistant to the President for Domestic Policy, and the Assistant to the President for Economic Policy.

2. Agencies are expected to establish procedures to provide more compliance assistance through pre-enforcement rulings, such as advisory opinions

The Order directs agencies to “give businesses, especially small businesses, the confidence they need to re-open by providing guidance on what the law requires.” Order § 1. To do this, the Order tells agencies to “accelerate procedures by which a regulated person or entity may receive a pre-enforcement ruling . . . with respect to

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whether proposed conduct in response to the COVID-19 outbreak, including any response to legislative or executive economic stimulus actions, is consistent with statutes and regulations administered by the agency.” An earlier Executive Order from October 2019 – [EO 13892](#) – had directed agencies to establish procedures for pre-enforcement rulings, though many agencies have yet to formulate such procedures. A pre-enforcement ruling may take the form of informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (Title II), letter rulings, advisory opinions, and no action letters. See [EO 13892](#), § 2(f).

3. Agencies are expected to issue non-enforcement policies for “good faith” efforts to comply with rules and guidance

The Order asks agencies to consider whether to publically issue policy statements under which the agency would “decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards, including those persons and entities acting in conformity with a pre-enforcement ruling.” Order § 5(b). The Order specifically points to guidance issued by the Centers for Disease Control and Prevention (CDC), Order § 5(c), presumably in recognition that many businesses will be relying on CDC’s guidance and recommendations as they reopen.

As we [noted last week](#), it remains to be seen how regulatory agencies will respond to the Order in ongoing and future rulemaking and enforcement decisions. These directives provide important opportunities for businesses to engage with the regulatory agencies, and help shape deregulatory activity and enforcement policy for the near future. For instance, for organizations like health care providers that have enjoyed regulatory flexibility from waivers and other legislative or administrative action, this Order presents an opportunity to request longer term, and potentially permanent, regulatory relief.

Further, agencies’ implementation of the “pre-enforcement rulings” directive could present new opportunities to ensure compliance and reduce enforcement risk, and could prove particularly helpful to businesses navigating complex, and often-changing federal rules and guidance. Regulated entities should pay close attention to implementation of this and [Executive Order 13892](#).

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