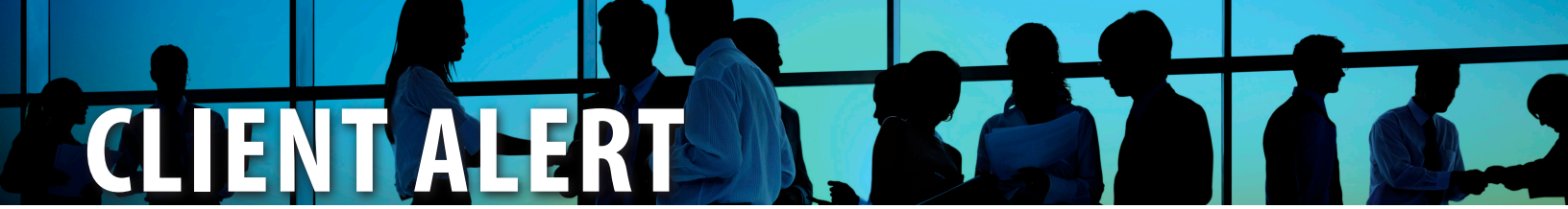

ADMINISTRATIVE & REGULATORY LAW

CONTROLLED BURN: THE DEPARTMENT OF JUSTICE ANNOUNCES IT WILL NOT RELY ON AGENCY GUIDANCE DOCUMENTS IN AFFIRMATIVE CIVIL ENFORCEMENT CASES

by Joshua E. Porte, Andrew L. Sparks, Kerry B. Harvey and Joshua L. Burgener

On January 25, 2018, Associate Attorney General Brand issued a memorandum titled "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases," (the "**Brand Memo**") which clarified that Department of Justice (the "**Department**") civil litigators may not rely on guidance documents issued by executive branch agencies when enforcing federal regulations via affirmative civil enforcement actions ("**ACE**").[1] Regulated parties that are or may become subject to ACEs should be aware of this significant change in federal regulatory enforcement policy. This article: (1) describes the basic process that agencies are supposed to follow when promulgating new binding rules; (2) explains how agencies have circumvented this process by issuing binding rules embedded in purportedly non-binding "guidance documents"; and (3) analyzes how the Brand Memo (and its predecessor, the Sessions Memo), may clear away some of the regulatory overgrowth and assist regulated parties in meeting their federal regulatory compliance obligations.

Procedures for Issuance of Administrative Rules

Under well-established Supreme Court precedent, Congress may delegate rulemaking functions to executive branch agencies, so long as Congress provides an "intelligible principle" to guide the exercise of such authority and constrain agency discretion.[2] The Administrative Procedure Act (the "**APA**")[3] creates a set of policies and procedures that agencies must follow to exercise their rulemaking powers. Most significantly, Section 553 of the APA generally requires federal agencies to provide public notice and an opportunity to comment on any proposed rule. If an agency fails to follow the procedures prescribed by the APA in issuing a new rule,[4] a regulated party may ask a court to declare the rule invalid on procedural grounds.[5]

Guidance Documents

Notably, however, agencies do not need to follow notice-and-comment procedures to publish guidance documents, which include "interpretive rules, general statements of policy, or rules of agency organization procedure, or practice."[6] And because the notice-and-comment process can be cumbersome and time-consuming, many agencies have attempted to characterize binding rules[7] —which should be promulgated under the notice-and-comment procedures— as guidance documents.[8] For example, in *Iowa League of Cities v. EPA*,[9] the Eighth Circuit addressed whether certain letters sent by the EPA to Senator Chuck Grassley merely interpreted existing regulatory requirements or "effectively set forth new regulatory requirements with respect to water treatment processes at municipally owned sewer systems."[10] The Eighth Circuit invalidated the rules described in the letters on the ground that they were substantive rules issued in violation of the APA.[11] There are myriad other examples of agencies seeking to substantively bind parties through the enforcement of policies set forth in guidance documents.[12]

In addition to violating the APA, this tactic deprives regulated parties of notice of their additional or different compliance obligations, and deprives the public of an opportunity to assess the need for, improve the quality and clarity of, or seek judicial review of, such regulations.[13] It also drastically increases the expense and burden of complying with federal regulations because regulated parties must remain cognizant not only of rules issued through the APA's procedures, but also of the rules embedded in the constellation of informal guidance documents.[14] In addition, this practice has generated extensive legal challenges from industry groups and other regulated parties, embroiling the courts in abstract and sometimes intractable disputes over whether a particular agency directive is a true "legislative rule" or a mere "interpretive rule" or "general statement of policy."[15]

Sessions and Brand Memoranda

On November 16, 2017, Attorney General Sessions began paring back some of this regulatory overgrowth by issuing a memorandum, titled Prohibition on Improper Guidance Documents (the "**Guidance Policy**"), which prohibited the Department of Justice (the "**Department**") from issuing "guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch," or from relying on existing guidance documents to coerce regulated entities "into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation."[16] However, he noted that the Guidance Policy did not apply to "documents informing the public of the Department's enforcement priorities or factors the Department considers in exercising its prosecutorial discretion," among other things.[17]

The Brand Memo expanded on the principles set forth in the Sessions Memo by prohibiting Department civil litigators from relying on *any* agency guidance documents: "[E]ffective immediately for ACE cases, the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules. Likewise, Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases."[18] The Brand Memo is not a panacea for beleaguered regulated parties. For example, the Department could still rely on an aggressive interpretive rule in pushing for a favorable settlement of a suit relating to an environmental regulatory violation. But it will, at least, narrow the universe of applicable regulations and assist parties with understanding and meeting their compliance obligations.[19] It is also possible that the Sessions and Brand Memoranda will in some cases reduce the regulatory certainty enjoyed by some regulated entities: for example, the Sessions Memo may limit the Department's ability to send comfort letters to regulated entities assuring them that they will not be the target of an enforcement action if they engage in certain proposed

conduct. In the aggregate, however, a controlled burn of regulatory overgrowth that ultimately requires Department civil litigators and regulated parties to play by the same set of rules will likely produce outcomes in ACE cases that are fairer, and that hew more closely to the spirit of the APA.

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[1]Associate Attorney General Brand, Department of Justice, *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* at 1-2 (Jan. 25, 2018), available at https://www.justice.gov/file/1028756/download. The term "guidance documents" means "any agency statement of general applicability and future effect, whether styled as 'guidance' or otherwise, that is designed to advise parties outside the federal Executive Branch about legal rights and obligations." *Id.* at 1 & n.1.

[2] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394)).

[3]Pub. L. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 500 et seq.).

[4] *See* 5 U.S.C. § 553.

[5] *See, e.g., PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (remanding a proposed rule to the EPA because the EPA failed to adhere to the APA's notice and comment procedures).

[6] 5 U.S.C. § 553(b)(A); *see also* n.1, *supra*.

[7] The term "rule" is defined in the APA to mean:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.] 5 U.S.C. § 551(4).

[8] *See, e.g., Nat'l Mining Ass'n v. McCarthy*, 753 F.3d 243, 251 (D.C. Cir. 2014) ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule. An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule. (As to interpretive rules, agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule.) An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.").

[9] 711 F.3d 844 (8th Cir. 2013).

[10] *Id.* at 854.

[11] *See* Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. OF L. ANALYSIS 47, 71-73 (June 2016).

[12] *See, e.g., id.*

[13] *See id. at 63.*

[14] See id. at 61.

[15] *See id.; see also Iowa League of Cities*, 711 F.3d at 872-73 (setting forth a test for distinguishing between legislative and interpretive rules).

[16] Attorney General Sessions, Department of Justice, *Prohibition on Improper Guidance Documents* at 1-2 (Nov. 16, 2017), available at https://www.justice.gov/opa/press-release/file/1012271/download. [17] *Id.* at 2.

[18] *Id.*

[19] *See id.* ("[T]he Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation. That a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean that the party violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations.").

[20] *See* Sessions Memo, *supra* n.11, at 1 ("It has come to my attention that the Department has in the past published guidance documents—or similar instruments of future effect by other names, such as letters to regulated entities—that effectively bind private parties without undergoing the rulemaking process. The Department will no longer engage in this practice.").

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FOR MORE INFORMATION CONTACT:

Andrew L. Sparks is a Of Counsel in Dickinson Wright's Lexington office. He can be reached at 859-899-8734 or asparks@dickinsonwright.com.

Kerry B. Harvey is a Member in Dickinson Wright's Lexington office. He can be reached at 859-899-8739 or kharvey@dickinsonwright.com.

Joshua L. Burgener is a Member in Dickinson Wright's Nashville office. He can be reached at 615-620-1757 or jburgener@dickinsonwright.com.

Joshua E. Porte is an Associate in Dickinson Wright's Nashville office. He can be reached at 615-620-1712 or jporte@dickinsonwright.com.