Overview
On August 31, the US Office of Management and Budget (OMB) published a memorandum making recommendations to US federal agencies on implementing Section 6 of Executive Order (EO) 13924 ("Regulatory Relief to Support Economic Recovery") issued May 19. The recommendations are intended to counter the detrimental economic impact of regulatory enforcement during COVID-19 by offering best practices to guide the agencies in reviewing and revising their enforcement and adjudication procedures so as to provide regulatory relief.

The OMB recommendations, based on “principles of fairness in administrative enforcement and adjudication,” are enumerated in OMB Memorandum M-20-31. While the OMB recommendations are not binding on federal agencies, the OMB memorandum requests that heads of all federal agencies consider the principles and recommendations, and publish any needed revisions to agency enforcement and adjudication policies and procedures by November 26.

The OMB memorandum requests that any new rules are to be published as final, with no opportunity for public comment until after their effective date. This exception to OMB’s regular notice and comment procedures for rules affecting the public confirms that the OMB memorandum is intended as internal guidance only. Like the Justice Manual, which sets forth the US Department of Justice (DOJ) enforcement policies and responsibilities, the OMB memorandum creates no rights and obligations for those facing or undertaking enforcement actions.

While the OMB memorandum is issued to all US government departments and agencies, we offer a few observations on how US national security-oriented regulatory regimes compare to the principles outlined in the memorandum.

The Principles of Fairness
Section 6 of EO 13924 sets forth ten principles of fairness that agency heads are directed to consider, and to conform their procedures and practices for enforcement and adjudication, accordingly.
1. The government should bear the burden of proving an alleged violation of law; the subject of enforcement should not bear the burden of proving compliance.

2. Administrative enforcement should be prompt and fair.

3. Administrative adjudicators should be independent of enforcement staff.

4. Consistent with any executive branch confidentiality interests, agencies should provide favorable relevant evidence in their possession to the subject of an administrative enforcement action.

5. All rules of evidence and procedure should be public, clear, and effective.

6. Penalties should be proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.

7. Administrative enforcement should be free of improper government coercion.

8. Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.

9. Administrative enforcement should be free of unfair surprise.

10. Agencies must be accountable for their administrative enforcement decisions.

No surprises there. However, EO 13924 grants broad discretion to the agencies to implement only those principles they deem to be consistent with applicable law and “appropriate in the context of particular statutory and regulatory programs and policy considerations.” Thus, agencies may deviate from these principles if, in their view, adherence would be inappropriate and inconsistent with their policies and the statutes and regulations they deem relevant and applicable.

The Recommended Best Practices

OMB recommends a host of best practices that agencies should consider in determining whether their existing procedures should be revised. For each principle of fairness, as many as six bullet points are given to assist in its implementation. While seemingly settled law as stated, the best practices set forth in the OMB memorandum may differ from the apparent current practices of some national security-oriented enforcement agencies. We provide some illustrative examples below.

Burden of Proof

The OMB memorandum states that agencies should (i) review their procedures so that subjects of agency enforcement actions (“Subject Persons”) are “not required to prove the negative” and (ii) apply the “rule of lenity,” to make sure that any ambiguity in the regulations is read in favor of the Subject Person.

Some agencies, including the Department of the Treasury’s Office of Foreign Assets Control (OFAC) and the Department of Commerce Bureau of Industry and Security (BIS) have a low threshold for initiating investigations and impose liability for violations either on a strict liability or “should have known” basis. Moreover, these agencies have the authority to bar entities and individuals from access to US goods and services (including the US financial system) by adding them to various restricted party lists (e.g., Specially Designated Nationals and Blocked Persons List and the Entity List, respectively) without prior notice or access to the evidence on which the listing is based, which may be classified or otherwise withheld.

In these situations, Subject Persons are often required to prove the negative through extensive document and transaction reviews, to disprove any potential evidentiary basis for the government’s actions. These look-back exercises involve interviewing relevant employees to determine whether anyone within the organization had actual knowledge or should have known about any potential violative conduct, the results of which must be disclosed to the government to receive any credit for cooperation. The significant cost of proving that a company was compliant, in addition to the potential disruption caused by a denial of access to US suppliers and the US financial system, could be avoided if the government provided evidentiary support to Subject Persons before initiating harsh regulatory actions against them, or in the case of listings during the administrative process for seeking removal of the restrictions.

Similarly, applying the “rule of lenity” could significantly lessen the impact to the economy when agencies are investigating regulatory violations. For example, both OFAC sanctions programs and the Export Administration Regulations (EAR) contain broadly-worded prohibitions, undefined terminology, and general legal principles, which sometimes require post-hoc agency guidance in the form of numerous Frequently Asked Questions (FAQs). While these FAQs often help, in many instances, such guidance from the agencies is not clear. Just as often, key elements of the regulatory regime are left unexplained to provide the agencies maximum latitude for interpretation and application. Companies unwilling to hazard enforcement can unnecessarily “de-risk,” thereby causing them and potential business partners to lose legitimate business opportunities.

Prompt and Fair

The OMB memorandum states that in order for administrative actions to be “prompt and fair,” agencies should consider their policies and regulations regarding, inter alia: (i) tolling agreements; (ii) the duration of investigations; (iii) closure of investigations; and (iv) elimination of multiple enforcement actions for the same set of operative facts.
(i) Tolling Agreements. The OMB memorandum states that agencies should seek pre-approval for tolling agreements, implying that extension of the statute of limitations should be the exception for good cause. In practice, OFAC and BIS will ask Subject Persons to sign tolling agreements early in an investigation and at regular intervals thereafter. Tolling appears to be treated as the norm, not the exception.

(ii) Duration and (iii) Closure of Investigations. The OMB memorandum states that agency regulations should limit the duration of the investigations and provide for timely closure of the investigation. Once the investigation is closed, the agency should inform the Subject Person and, if there is no finding of a violation, the agency should state so. In practice, OFAC and BIS investigations can take years to close and, in some instances, have been held open indefinitely, without a reason for the delay or notice of closure.

(iv) Estoppel and Res Judicata. The OMB memorandum states that the agencies should adopt principles to eliminate multiple enforcement actions for the same set of underlying facts. In practice, for sanctions and export control enforcement cases, multiple agencies (e.g., DOJ, BIS, OFAC, and bank regulators) will charge Subject Persons under multiple statutes and regulations based on a single body of operative facts. Moreover, there have been cases in which a Subject Person has settled charges with DOJ and one administrative agency, only to face charges filed thereafter by another agency based on the same underlying facts. A multi-year consent order provides numerous opportunities to charge and re-charge the same company struggling to survive heavy fines and penalties, the costs of investigation, and building its compliance program while responding to requests and inquiries from a compliance monitor for whom the company also bears the cost.

Disclosure of Exculpatory Evidence

The OMB memorandum states that agencies should provide “favorable relevant evidence” in their possession to Subject Persons to the extent “consistent with executive branch confidentiality interests.” Disclosure of exculpatory information by agency officials should conform to practices described in *Brady v. Maryland* and the *Justice Manual*, and should be automatic if material to the mitigation of damages or penalties.

The exception for “executive branch confidentiality interests” sometimes swallows the rule, if agency officials are allowed to assert it freely. However, just as courts and prosecutors have complied with *Brady* disclosure obligations in the criminal context without compromising confidentiality interests, so too should this fundamental principle of fairness apply in the civil enforcement context. Moreover, timely disclosure of exculpatory evidence can prevent waste of resources on weak and implausible cases, and reduce the cost arising from misdirected defense investigations.

Improper Government Coercion

The OMB memorandum states that agencies should not select targets for investigations or enforcement actions for retaliatory or punitive reasons or from a “desire to compel capitulation.” In practice, OFAC and BIS, along with other agencies, may threaten a formal subpoena to compel compliance with “voluntary” requests for information. BIS has added or threatened to add Subject Persons to the Entity List, jeopardizing access to US-origin goods and technology during the course of an investigation in order to compel cooperation or resolution on their proposed terms.

To prevent improper motivations, when an enforcement action has already been commenced, an additional investigation of the same party should not be initiated unless new facts are uncovered or good cause is shown, according to the OMB memorandum.

Observations

While these best practices are not new and should already be implemented by federal agencies, there have been situations where they were not applied, particularly in regulatory enforcement cases related to national security matters such as economic sanctions and export controls.

Therefore, whether and how federal agencies amend their respective rules may depend on whether the agencies view the OMB recommendations as already operative, or inappropriate and inconsistent with their policies or the statutes and regulations they deem relevant and applicable.

Practices

Economic Sanctions

Export Controls