The Impact of Executive Order 13924 and Its Implementing OMB Memorandum on Administrative Enforcement

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In late August 2020, to little notice, the Office of Management and Budget issued a memorandum (the OMB Memorandum) that is likely to have significant implications for administrative enforcement, extending well into the Biden administration and beyond.

The OMB Memorandum implemented Executive Order 13924, titled "Executive Order on Regulatory Relief To Support Economic Recovery," which was issued on May 19, 2020, to address a number of topics designed to support the nation's recovery from the COVID-19 pandemic. Section 6 of the executive order set forth several principles for "Fairness in Administrative Enforcement and Adjudication" and directed the heads of agencies to "revise their procedures and practices in light of them." The OMB Memorandum, in turn, provided detailed guidance, covering a wide range of topics, including the conditions under which liability should be imposed, penalties, transparency and discovery, tolling agreements, and consent order duration.

All of these topics have significant implications for enforcement in consumer financial services as well as other areas subject to administrative enforcement. Among the key directives are the following:

- **Burden of Proof.** Agencies should "ensure that members of the regulated public are not required to prove a negative to prevent liability and enforcement consequences" in the absence of statutory standards requiring otherwise.
  - This guidance could be helpful in clarifying the burden of proof with respect to areas such as the Equal Credit Opportunity Act, where disparate impact liability may apply if there are so-called "less discriminatory alternatives," and the "unfairness" prohibition under the Consumer Financial Protection Act or Section 5 of the Federal Trade Commission Act, where it must be shown that consumer harm is "not reasonably avoidable" by consumers.
- **Penalties and Leniency.** Agencies should "consider applying the rule of lenity" — a doctrine more frequently applied in the criminal context — in administrative investigations, enforcement actions and administrative adjudications where there are "genuine statutory or regulatory ambiguities" related to violations and penalties. Furthermore, agencies should establish "policies of enforcement discretion that decline enforcement or the imposition of a penalty, as appropriate ... when the agency determines that the regulated party attempted in good faith to comply with the law."
  - While good faith is generally a factor in determining the amount of penalties, the OMB Memorandum goes further and suggests that agencies should formally consider abstaining from imposing penalties, or from initiating an enforcement action in the first instance, where the institution has acted in good faith.
- **Promptness and Tolling Agreements.** Administrative enforcement should be "prompt," and agencies should "seek approval of an Officer of the United States, or if necessitated by good cause, his or her designee, before entering into a tolling agreement."
  - It has become commonplace for investigations to last several years and for enforcement agencies to request tolling agreements, sometimes in the early stages of an investigation and often without identifying any special need for tolling. The OMB Memorandum may make such requests less common.

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- **Investigation Closure.** When a party has been informed that it is under investigation, the agency "should inform the party when the investigation is closed and, when the agency has made no finding of violation, so state."
  - Agencies frequently close investigations or allow them to become inactive without notifying the institution, which can create hardship and uncertainty for institutions, especially those with public disclosure obligations.
- **Disclosure of Favorable Evidence.** Agencies should "conform their civil adjudicatory evidence disclosure practices to those described by the Supreme Court in *Brady v. Maryland* [requiring disclosure by the government of exculpatory evidence]" and other cases. In addition, agencies should "timely disclose exculpatory evidence to the target party of enforcement using similar procedures as those laid out in the *Justice Manual* of the U.S. Department of Justice."
  - While these provisions in the OMB Memorandum appear focused on adjudicatory proceedings, similar principles may encourage agencies to be more transparent regarding evidence in the investigatory and pre-suit phases as well.
- **Statutory and Regulatory Violations.** Liability "should be imposed only for violations of statutes or duly issued regulations."
  - Some agencies have sought to impose liability based on violation of agency policy or guidance documents, rather than legal obligations based directly on statutory or regulation text. This practice is not permitted under the OMB Memorandum.
- **Limited Duration of Consent Orders.** Agencies should "adopt expiration dates and/or termination criteria for consent orders." In addition, "[d]ecade(s)-long settlement terms that are disproportionate to the violation(s) of law should be strongly disfavored absent a clear and convincing need for time to implement a remedy such as, *e.g.*, infrastructure improvements or long-term remedial actions."
  - Agencies frequently seek long consent order terms (and, in some cases, no defined ending period). The OMB Memorandum may support arguments for a narrow tailoring between the term of the consent order and the nature of the remedial measures.

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The impact of the OMB Memorandum remains to be seen, particularly as to directives such as "prompt" resolution, which are inherently subjective. Moreover, the OMB Memorandum does not purport to create rights enforceable by parties. Nonetheless, it represents a potential move toward greater fairness and transparency in administrative enforcement.