PUBLICATIONS

Executive Order May Aid Targets of Government Investigations

SRZ Private Funds Regulatory Update

November 2020

A recent Executive Order[1] ("Executive Order") and implementing guidance from the Office of Management and Budget ("OMB")[2] directs federal executive departments and agencies to be more lenient, expedient and transparent in investigations and enforcement actions. [3] The Executive Order addresses several longstanding concerns about procedural and substantive fairness for entities facing investigations and enforcement actions. Regulated entities should evaluate their compliance programs to ensure that they are well-positioned to take advantage of promised leniency for good faith compliance efforts.

To promote economic recovery, the Executive Order directs a number of changes that potentially could impact enforcement activity by the SEC and other regulatory agencies. Most significantly, executive departments and agencies are directed to find places to be lenient, such as declining to bring enforcement actions where there has been a good faith attempt to comply with the law. This marks a significant change from the "broken windows" approach the SEC had implemented previously.

The Executive Order states that liability should only be imposed for violations "of statutes or duly issued regulations, after notice and an opportunity to respond." According to the implementing guidance, this means telling investigation targets what statutes and regulations are asserted to have been violated, along with an explanation of how the conduct at issue runs afoul of that statute or regulation. This approach would mark a sea change for those familiar with handling SEC inquiries. Traditionally, SEC staff decline to provide any information during most investigations, other than to say they are conducting a fact-finding inquiry. Transparency during investigations would enable targets to more efficiently contextualize facts shared with the SEC and prepare potential defenses. Also, in stark contrast to current SEC practice, agencies were directed to turn over evidence favorable to the target — akin to the standard practice in criminal investigations.

The OMB implementing guidance also instructs agencies to reward cooperation and self-reporting with reduced or waived civil fines and to allow firms grace periods to cure minor violations. This focus on cooperation and self-reporting mirrors recent actions and statements by the SEC and the CFTC, including large scale amnesty initiatives and formal guidance regarding cooperation credit.[4]

The Executive Order and OMB guidance additionally directed agencies to expedite investigations. The OMB took particular aim at the routine use of tolling agreements, seeking to limit the duration of investigations and to set deadlines for bringing charging decisions.[5]

Regarding transparency, the Executive Order directs agencies to notify targets of investigations when the investigation is concluded, including providing affirmative statements that no violation has been found. This is a significant and welcome change for regulated entities, which traditionally were left in limbo for extended periods of time not knowing whether an investigation had been concluded. Moreover, in the rare instances the SEC provided notification that an investigation had ended, it frequently noted that the closing of the investigation did not mean that no violation of law had occurred.

It remains to be seen to what extent the Executive Order will impact SEC and other regulatory investigations, particularly if the SEC takes the position that it is not subject to the Executive Order. At a minimum, this guidance should empower subpoena recipients or investigation targets to seek these additional substantive and procedural protections. Additionally, regulated entities would be well served to evaluate their compliance policies and supervisory efforts to maximize their ability to seek lenience for good faith compliance efforts. Regulated entities should also consider the Executive Order as another factor in evaluating whether to self-report potential violations of law.

This article appeared in the November 2020 edition of SRZ's Private Funds Regulatory Update. To read the full Update, click here.

---

[1] Exec. Order No. 13924, 85 C.F.R. 31353 (2020).

[2] U.S. Office of Management and Budget, M-20-31, Memorandum for the Deputy Secretaries of Executive Departments and Agencies (Aug. 31, 2020).

[3] The text of the Executive Order and implementing guidance appear to include the SEC, which is not an executive department, because of the conjunctive reference to executive departments and agencies. The OMB guidance is directed to the "heads of all agencies," and not limited to those agencies that are a part of the executive branch. That said, the SEC, which is an independent agency and not part of the executive branch, may take the position that the order only applies to agencies that are part of the executive branch and thus within the power of the executive branch to set policy.

[4] The CFTC recently formalized its self-reporting and cooperation program to more closely mirror that of the Department of Justice. *See,* e.g. Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisor

[5] In its 2020 fiscal year report, released on Nov. 2, 2020, the SEC Division of Enforcement highlighted its continued "focus on shortening the amount of time it takes to complete investigations and recommend enforcement actions," noting it had reduced the average time it takes to complete financial fraud and issuer disclosure investigations from 37 months to 34 months.

Related People

Marc Elovitz
Partner
New York

Anna Maleva-Otto
Partner
London

Craig Warkol
Partner
New York

Kelly Koscuiszka
Partner
New York

Practices

INVESTMENT MANAGEMENT

REGULATORY AND COMPLIANCE

Attachments

Read Article

Read Update