

## DOJ's Gift to Defense and Compliance Attorneys

By Jeffrey C. Corey

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The U.S. Department of Justice recently gave a gift to attorneys who represent clients in heavily-regulated industries. On January 25, 2018, Associate Attorney General Rachel L. Brand issued a memorandum to all

U.S. Attorneys' offices titled: "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" (hereinafter referred to as the "Brand Memo"). The practical effect of the Brand Memo is that administrative agencies will have a harder time bringing civil enforcement cases – much to the benefit of businesses in heavily regulated industries and the attorneys who represent them.

As suggested by its title, the Brand Memo significantly limits the ability of DOJ file enforcement cases based on agency guidance. It instructs DOJ attorneys that guidance documents issued by administrative agencies "cannot create binding requirements that do not already exist by statute or regulation." The memo then proceeds to tie the hands of any DOJ attorney contemplating filing a lawsuit based on an alleged violation of agency guidance. It expressly prohibits DOJ attorneys from using "noncompliance with guidance documents as a basis for proving violation of applicable law."<sup>1</sup>

The Brand Memo could have a significant impact on how the federal government enforces the law. DOJ represents the federal administrative agencies who are charged with enforcing the law in many heavily-regulated industries, including health care, environmental, tax, finance, among others. If a federal agency wants to file an enforcement action in federal court, it has to convince DOJ attorneys of the merits of filing a lawsuit on the agency's behalf. As a result of the Brand Memo, DOJ must decline agency requests to file enforcement actions based on an alleged failure to comply with administrative guidance. In other words, agencies can no longer rely on guidance documents to salvage enforcement cases based on less-than clear regulations.

This is no small change, given how often agencies issue guidance – and file enforcement actions based at least in part on that guidance. For example, a 2015 Government Accountability Office study found agencies issued anywhere between 10 to over 100 guidance documents per agency per year.<sup>2</sup> In the enforcement context, agency guidance creates numerous problems for industry. Businesses have to stay up to date on the latest agency guidance (as well as applicable laws and regulations). Until recently, they also had to fear that a failure to adhere to the latest agency guidance document could expose them to enforcement action.

<sup>1</sup> The Brand Memo broadly defines "guidance document" as meaning "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."

<sup>2</sup> United States Government Accountability Office, Regulatory Guidance Processes: Selected Departments Could Strengthen Inederal Control and Dissemination Practices (April 2015).

The Brand Memo simultaneously protects businesses and gives them more options. If an agency issues guidance that is helpful to a regulated entity, it can continue to rely on the guidance. On the other hand, if a guidance memo is not helpful, the regulated entity now has the option of making a calculated choice. It may choose to give less weight to the guidance or construe it narrowly. In a post-Brand-Memo world, that choice is less risky for the company because the guidance cannot provide a basis for enforcement action. In other words, the Brand Memo gives companies the option of taking a riskier approach that arguably conflicts with agency guidance.

There are limits to the protection provided by the Brand Memo. Perhaps most significantly, it is only binding on DOJ. Many agencies are empowered to bring administrative cases in administrative tribunals. Those administrative cases do not have to be screened or litigated by DOJ attorneys. The Brand Memo also applies only to civil enforcement actions. It does not govern the filing of criminal cases by DOJ attorneys. Those limits, however, may be more formalistic than real. Given that DOJ effectively has disavowed agency guidance documents in the civil enforcement context, it is difficult to see DOJ or agencies filing a slew of criminal or administrative enforcement cases based on now-discredited guidance.

The Brand Memo should be viewed in context with the current state of agency action – especially the slowdown in agency action more generally. Consistent with the current political objectives of the executive branch, we should expect very limited formal rulemaking activity by administrative agencies over the next several years. Agencies no longer can overcome a slowdown in rulemaking through administrative guidance because, as a result of the Brand Memo, the effectiveness of agency guidance is significantly diminished. Rational

businesses should now give less weight to agency guidance documents, especially when faced with a judgement call as to whether any such guidance clearly precludes certain actions. The Brand Memo effectively lets businesses take more risks without fear of enforcement and provides insurance against violations of agency policy. Thanks to the Brand Memo, compliance managers and the attorneys who represent them should sleep a little easier at night.