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A short United States Department of Justice memorandum with big legal consequences

On Jan. 25, 2018, the United States Department of Justice (U.S. DOJ) issued a memorandum limiting the use of federal agency guidance documents in civil enforcement actions that could have far reaching consequences in the private sector. See [here](#).

Under the directives contained in this memorandum, U.S. DOJ attorneys are instructed not to use noncompliance with federal agency guidance documents that have not gone through formal rule-making under the Administrative Procedures Act as evidence of violations of applicable law in federal civil enforcement actions. In particular, the U.S. DOJ instructs its attorneys that they may not use a private party's noncompliance with an agency guidance document for presumptively or conclusively establishing that a party violated an applicable statute or rule that an agency has delegated authority to implement. The memorandum continues by saying “[t]hat 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.”

In the past, federal agency guidance policy has been used by agencies as well as the U.S. Department of Justice as evidence of whether a regulated party has complied with federal statutes. For example, this use of guidance policies for enforcement decision has been regularly used by numerous federal agencies, such as the EPA, OSHA, SEC, Labor, the Treasury, FTC and many other federal agencies, in referring matters to the U.S. DOJ for enforcement of the federal statutes and regulations that these agencies have delegated authority to administer.

The U.S. DOJ memorandum will provide creative lawyers with new ammunition for negotiation with federal agencies when those agencies use noncompliance with their guidance as evidence of violations of laws that carry significant civil penalties for such actions. In addition, these same creative lawyers in the private sector will use the memorandum as evidence that a federal agency should not use guidance documents as evidence for important agency decision making such as permit decision making or related important agency decisions that have important consequences for the regulated community.

The information in this article is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.