

**Early Holiday Present? – Executive Order Issued Regarding Transparency and Consistent Inspection Practices:**  
*By Nathan E. Vassar*

On October 9, 2019, the President released an Executive Order (the “Order”) aimed at addressing a number of administrative agency practices, expressly targeting improved transparency, use of guidance documents, as well as enforcement and inspection approaches. The Order, entitled, “Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication” specifically requires the publication of a rule package for agencies that conduct routine compliance inspections, and is not tailored to any one particular federal agency.

The provisions of the Order of greatest interest and impact to Texas POTWs include Section 4 (“Fairness and Notice in Administrative Enforcement Actions and Adjudications”), Section 5 (“Fairness and Notice in Jurisdictional Determinations”), and Section 7 (“Ensuring Reasonable Administrative Inspections”). With regard to enforcement matters, the Order demands that agencies must avoid “unfair surprise” both in the imposition of penalties and when adjudicating past conduct deemed in violation of the law. The Order defines unfair surprise to mean the lack of reasonable certainty about the legal standard that the agency uses.

Under the Jurisdictional Determinations section, an agency can no longer avoid publication in the Federal Register if it intends to rely on a document from litigation (such as an enforcement order, settlement, or brief) in order to establish jurisdiction in a subsequent case. Furthermore, the Order prohibits an agency from seeking deference to its position arising from a completed litigation matter in order to expand that agency’s claim of jurisdiction. This area of the Order addresses the bootstrapping approach, by which an agency’s jurisdictional reach is sometimes expanded in a current case in light of a settlement/litigation determination that came

before it. Accordingly, if POTWs are told that certain activities or agency oversight on a particular matter are established, the response should inquire whether there has been a public consideration of the agency position, either by formal rule or publication in the Federal Register.

Finally, with regard to inspections, the Order expressly calls for a rule package within 120 days of the October 9 Order to provide for “agency procedure governing such inspections.” This change is structured to address inconsistent application across agencies’ practices throughout various regions of the country. Some agencies can point to existing inspection practices already covered by an existing rule, but the streamlined requirement expects to funnel compliance inspection approaches into a predictable and consistent approach, backed by the consideration of stakeholder input (via the rulemaking process).

The Order is just the latest in a series of Administration actions addressing federal agency oversight and rethinking long-established regulatory practices. The Order contains other provisions that may be of interest to the WEAT membership, although we will continue to track the development and implementation of follow-up requirements from the Order, including the rulemaking effort on inspection practices.

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