

New Executive Orders May Impact FTC Enforcement Actions Against Direct Sellers

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Two executive orders issued last month may decrease the FTC's ability to regulate industries through informal guidance documents. Because the FTC's regulation of the direct selling industry relies heavily on guidance, the orders are particularly relevant to our multi-level-marketing (MLM) and direct selling clients. Although any assessment of the practical impact of these orders is speculative at this point, we believe they may affect the FTC's regulation of direct sellers in a few important ways.

What the executive orders say

On October 9, President Trump issued two executive orders aimed at government agencies' use of guidance documents. The orders focus on making agency guidance more publicly accessible and preventing agencies from enforcing standards that appear only in guidance documents.

The first order, which we'll call the Guidance Order, actually excepts independent regulatory agencies—which includes the FTC—from its coverage. However, for reasons we'll explain, we think it may still influence the FTC's treatment of its guidance. The Guidance Order sets out two main requirements: (1) each agency must create a searchable, indexed database of all of its currently effective guidance on its website; and (2) each agency must enact regulations that set forth its procedures for issuing guidance. With respect to the procedures for issuing guidance, the order outlines additional rules, including that agencies must provide a notice-and-comment period for certain significant guidance documents, during which the public can express concerns about the guidance's contents or impact.

The second order, which we'll call the Enforcement Order, focuses on agencies' use of guidance in enforcement actions and adjudications. In an effort to prevent "unfair surprise," this order prohibits agencies from establishing violations of law in enforcement actions based only on guidance documents. Instead, the agency must establish violations based on the applicable statutes and regulations and may only cite guidance that was published in the Federal Register or in the searchable database described in the Guidance Order. In addition, under the Enforcement Order, agencies must provide regulated parties an opportunity to be heard before taking legal action against them—for example, issuing a no-action letter or notice of noncompliance—and the agency must respond in writing with the legal basis for its action. Finally, the Enforcement Order provides that each agency must publish a new rule of

procedure governing civil administrative inspections and must propose procedures to encourage voluntary self-reporting of regulatory violations in exchange for reduced penalties.

In addition, both orders contain a provision emphasizing that the orders do not create any causes of action by regulated parties to bring claims against the United States or its agencies.

What the executive orders could mean for the FTC and direct sellers

Based on the plain language of the executive orders and the FTC's practices so far, here's how we think the orders may impact the FTC and its regulation of direct sellers:

First, the Enforcement Order prohibits the FTC from proceeding with enforcement actions based solely on guidance. While the allegations in the FTC's [AdvoCare](#), [Herbalife](#), and [Vemma](#) complaints mirror interpretations it has set out in guidance, the complaints rely on Section 5 of the FTC Act as the basis for enforcement. At the very least, the Enforcement Order will prevent the FTC from proceeding against regulated parties based on guidance documents alone and ensure that it continues to establish violations of law based on the FTC Act and other applicable statutes and regulations. The order may also encourage the FTC to use the formal rulemaking process more frequently, rather than attempting to make policy changes through guidance. And the order's prohibition on enforcement actions based on guidance will likely have an even-more-significant impact—courts could be less deferential to the FTC's interpretation of statutes and regulations in guidance documents. It is difficult to predict whether this will occur—especially given that *Chevron* and *Auer* deference still exists^[1]—but if it does, it would make it easier for regulated parties to challenge FTC enforcement decisions in court.

Second, even though the Guidance Order does not apply to the FTC, the Enforcement Order's publication requirement may encourage the FTC to publish its guidance in the Federal Register or create a searchable guidance database on its website. The FTC does not appear to publish guidance in the Federal Register as a matter of course.^[2] Perhaps unsurprisingly, then, our [search of the Federal Register](#) turned up none of the FTC's MLM-related guidance, with the exception of some consent decrees. The FTC's website does contain a guidance page, but the database can only be filtered by topic and industry. In addition, the guidance page does not include the FTC's more informal guidance, such as its blog posts and press releases. If the FTC intends to cite its statements in these guidance documents in future enforcement actions, it will need to publish its MLM-related guidance as the Enforcement Order directs. If it does, direct sellers will have a clearer idea of which of the FTC's statements about MLMs it intends to enforce.

Third, the Enforcement Order reinforces the FTC's practice of giving regulated parties an opportunity to be heard pre-enforcement, and it may require the FTC to respond in writing. In most cases, the FTC is already providing an opportunity for a pre-enforcement challenge by a regulated party facing an enforcement action. The Enforcement Order cements this requirement and also formalizes a requirement that the FTC respond in writing to these types of pre-enforcement challenges.

One significant limitation to the orders' effects is that, as we noted above, both orders specifically state that they do not create any causes of action by regulated parties. As a result, if the FTC violates the provisions of the Enforcement Order—by, for example, pursuing enforcement actions based only on guidance—it is unclear what a regulated party could do to try to remedy that violation. A declaratory judgment action filed against the FTC in Illinois federal court on November 1 will likely shed some light on this question. In the lawsuit, Neora, an MLM that sells skincare products, alleges that the FTC's enforcement actions against MLMs violate both executive orders.^[3] Neora asks the court to issue a declaratory judgment providing, among other things, that the executive orders prohibit the FTC from bringing civil enforcement proceedings based on a test for an illegal pyramid scheme that has not been published in the Federal Register.^[4]

In summary, the new executive orders impose numerous requirements on agencies' issuance and use of guidance, many of which may impact the FTC's enforcement practices. Parties regulated by the FTC may also expect to see applicable guidance published in the Federal Register or in a more comprehensive guidance database on the FTC's

website. In addition, the orders reinforce the FTC's responsibility to ensure that its enforcement actions are based on the binding legal principles it was created to enforce.

^[1] Under the doctrine of *Chevron* deference, courts defer to an agency's interpretation of an ambiguous statute unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Forrest Gen. Hosp. v. Azar*, 926 F.3d 221, 228 (5th Cir. 2019) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). *Auer* deference is similar: it requires courts to defer to an agency's interpretation of its own ambiguous regulation unless it is "plainly erroneous or inconsistent with the regulation." *Id.* at 229–30 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)).

^[2] See Cary Coglianese, *Public Availability of Agency Guidance Documents*, Final Report to the Administrative Conference of the United States, at 28, 37 (May 15, 2019), available at <https://www.acus.gov/sites/default/files/documents/Coglianese%20Guidance%20Report%20to%20ACUS%2005.15.19%20-%20FINAL.pdf> (noting that FTC is not required by statute or regulation to make guidance publicly available and providing table comparing FTC's Federal Register entries on guidance to those of other agencies).

^[3] Complaint, *Nerium Int'l, LLC v. FTC*, No. 1:19-cv-07189 (N.D. Ill. Nov. 1, 2019).

^[4] See *id.* at 54–55 ("Plaintiffs thus ask that the Court declare the following: . . . (3) Pursuant to the two Executive Orders on Promoting the Rule of Law issued by the President on October 9, 2019, the FTC may not bring any civil administrative enforcement proceeding or adjudication based upon a new interpretation, theory or test for an illegal pyramid scheme if it has not been published in the Federal Register and the public given a fair opportunity to comment.")

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