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THE JOURNAL OF FEDERAL AGENCY ACTION

Editor's Note: Outbound Investment
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David R. Johnson, Jamie F. Tabb, Tyler E. Robinson, Elizabeth Krabill McIntyre, Leslie Edelstein, Gabrielle Gunshol, and Madison Torrez

Trump's Pro-Crypto Agenda: Will Antitrust Regulators Keep Decentralized Cryptocurrency Competitive?
Evan Miller

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Frederick R. Ball, Erin M. Duffy, Coleen W. Hill, and Victoria Hawekotte

CFIUS Enforcement Powers Expanded Considerably and Penalty Limits Increased Significantly by New Final Rule
Geoffrey M. Goodale, Joel N. Ephross, Hope P. Krebs, Thomas R. Schmuhl, Elizabeth G. Hodgson, and Raul Rangel Miguel

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The Journal of Federal Agency Action

Volume 3, No. 2 | March–April 2025

81 **Editor's Note: Outbound Investment**
Victoria Prussen Spears

85 **Outbound Investment Control Regime Goes Live**
David Mortlock, Britt Mosman, David Levine, and Ahmad El-Gamal

101 **Adding Fuel to the Fires Calling for Permitting Reform: D.C. Circuit Decides Long-Lingering Issue of Council on Environmental Quality's Rulemaking Authority**
Jason A. Hill, Jim Noe, Rafe Petersen, Jennifer L. Hernandez, Alexandra E. Ward, and Kamran Mohiuddin

113 **NLRB Reinstates "Clear and Unmistakable Waiver" Standard for Unilateral Changes**
Eve I. Klein, Haley Ferise, Jesse Stavis, and Elizabeth Mincer

117 **Trump Administration 2.0: What Government Contractors Should Expect**
David R. Johnson, Jamie F. Tabb, Tyler E. Robinson, Elizabeth Krabill McIntyre, Leslie Edelstein, Gabrielle Gunshol, and Madison Torrez

125 **Trump's Pro-Crypto Agenda: Will Antitrust Regulators Keep Decentralized Cryptocurrency Competitive?**
Evan Miller

129 **Health and Human Services Issues Final Rule on Research Misconduct**
Frederick R. Ball, Erin M. Duffy, Coleen W. Hill, and Victoria Hawekotte

135 **CFIUS Enforcement Powers Expanded Considerably and Penalty Limits Increased Significantly by New Final Rule**
Geoffrey M. Goodale, Joel N. Ephross, Hope P. Krebs, Thomas R. Schmuhl, Elizabeth G. Hodgson, and Raul Rangel Miguel

139 **New H-1B Rule Aims to Modernize H-1B Visa Program**
Kerri-Ann Griggs and Eileen Scofield

143 **SEC's Settlement with Keurig Portends Expanded ESG Liability**
Robert Stern, Lyuba Goltser, Rebecca Grapsas, and Ben Marcu

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Publishing Staff
Publisher: Leanne Battle
Production Editor: Sharon D. Ray
Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

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Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005
https://www.fastcase.com/

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Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

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Leanne Battle, Publisher, Full Court Press at leanne.battle@vlex.com or at 866.773.2782

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

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Editor's Note
Outbound Investment

Victoria Prussen Spears*

This issue of *The Journal of Federal Agency Action* begins with an article exploring the outbound investment final rule in depth, and we have much more!

Outbound Investment

In our lead article, "Outbound Investment Control Regime Goes Live," David Mortlock, Britt Mosman, David Levine, and Ahmad El-Gamal, attorneys at Willkie Farr & Gallagher LLP, discuss the Department of the Treasury's outbound investment review regulations in depth. While the Regulations apply to a fairly limited universe of investments at present, the authors expect that they will still impose non-negligible diligence requirements on U.S. investors and may set the stage for more expansive Regulations on outbound investment in the future.

CEQ Authority

The U.S. Court of Appeals for the District of Columbia Circuit recently ruled that the Council on Environmental Quality lacks statutory authority to issue binding regulations under the National Environmental Policy Act. In our next article, "Adding Fuel to the Fires Calling for Permitting Reform: D.C. Circuit Decides Long-Lingering Issue of Council on Environmental Quality's Rulemaking Authority," Jason A. Hill, Jim Noe, Rafe Petersen, Jennifer L. Hernandez, Alexandra E. Ward, and Kamran Mohiuddin, attorneys at Holland & Knight LLP, discuss the decision and its implications.

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NLRB Standards

Eve I. Klein, Haley Ferise, Jesse Stavis, and Elizabeth Mincer, attorneys at Duane Morris LLP, contributed an article titled "NLRB Reinstates 'Clear and Unmistakable Waiver' Standard for Unilateral Changes," in which they discuss *Endurance Environmental Solutions, LLC*, a National Labor Relations Board (NLRB) decision in which the NLRB reverted to its previous standard for evaluating whether a union has waived its right to bargain over changes to terms and conditions of employment that an employer wishes to make during the term of a labor agreement. The authors note that the decision will almost certainly not be the Board's last word on this subject.

Potential New Administration Policies

During his campaign, Donald Trump publicly discussed the implementation or removal of several policies that could significantly impact government contractors. The authors of our next article, David R. Johnson, Jamie F. Tabb, Tyler E. Robinson, Elizabeth Krabill McIntyre, Leslie Edelstein, Gabrielle Gunshol, and Madison Torrez, of Vinson & Elkins LLP, discuss the potential changes that could lead to a different landscape in government contracting over the next four years in their article, "Trump Administration 2.0: What Government Contractors Should Expect."

Excitement is building in the blockchain and cryptocurrency industries. Industry leaders are hopeful that the pro-cryptocurrency stances held by President Trump and his appointees will foster a regulatory environment that supports growth and innovation in decentralized technology. Evan Miller, a partner at Vinson & Elkins LLP, explores the topic in his article, "Trump's Pro-Crypto Agenda: Will Antitrust Regulators Keep Decentralized Cryptocurrency Competitive?"

Research Misconduct Rule

In our next article, "Health and Human Services Issues Final Rule on Research Misconduct," Frederick R. Ball, Erin M. Duffy, Coleen W. Hill, and Victoria Hawekotte, attorneys at Duane Morris LLP, discuss the Department of Health and Human Services' Office

of Research Integrity final rule on research misconduct policies for Division of Public Health Services funding recipients.

CFIUS Enforcement Powers

In their article, "CFIUS Enforcement Powers Expanded Considerably and Penalty Limits Increased Significantly by New Final Rule," Geoffrey M. Goodale, Joel N. Ephross, Hope P. Krebs, Thomas R. Schmuhl, Elizabeth G. Hodgson, and Raul Rangel Miguel, attorneys at Duane Morris LLP, discuss the U.S. Department of the Treasury's final rule that expands the enforcement powers of the Committee on Foreign Investment in the United States and significantly increases the potential financial consequences for noncompliance.

H-1B Visa Rule

Kerri-Ann Griggs and Eileen Scofield break down the many changes U.S. Citizenship and Immigration Services implemented for the H-1B and F-1 visa programs in their article, "New H-1B Rule Aims to Modernize H-1B Visa Program."

SEC's Settlement with Keurig

The Securities and Exchange Commission charged Keurig with filing allegedly incomplete and inaccurate annual reports regarding the recyclability of its K-Cup single-use beverage pods. Keurig agreed to pay a $1.5 million civil penalty and accept a cease-and-desist order, without admitting or denying the Commission's findings. Robert Stern, Lyuba Goltser, Rebecca Grapsas, and Ben Marcu, attorneys at Weil, Gotshal & Manges LLP, discuss the settlement and its implications in their article, "SEC's Settlement with Keurig Portends Expanded ESG Liability."

Enjoy the issue!

Note

* Victoria Prussen Spears, Editor of *The Journal of Federal Agency Action*, is Senior Vice President of Meyerowitz Communications Inc. A graduate

of Sarah Lawrence College and Brooklyn Law School, Ms. Spears was an attorney at a leading New York City law firm before joining Meyerowitz Communications. Ms. Spears, who also is Editor of *The Journal of Robotics, Artificial Intelligence & Law*, *The Global Trade Law Journal*, and *The Global Regulatory Developments Journal*, may be contacted at vpspears@meyerowitz communications.com.

Outbound Investment Control Regime Goes Live

David Mortlock, Britt Mosman, David Levine, and
Ahmad El-Gamal*

In this article, the authors discuss the Department of the Treasury's outbound investment review regulations. While the Regulations apply to a fairly limited universe of investments at present, the authors expect that they will still impose non-negligible diligence requirements on U.S. investors and may set the stage for more expansive Regulations on outbound investment in the future.

On January 2, 2025, the Department of the Treasury's long-gestating outbound investment review regulations (the Regulations) went into effect, following their release of a final rule. Treasury also published a new set of FAQs on December 13, 2024, to further clarify aspects of the Regulations discussed in the final rule.[1] This regime, colloquially referred to as "reverse CFIUS" (Committee on Foreign Investment in the United States), either prohibits or imposes notification requirements on certain investments by U.S. persons in three specific sectors: advanced semiconductors, quantum information technologies, and certain highly capable artificial intelligence (AI) systems. Such investments are prohibited or become notifiable only when they are sufficiently connected to a "country of concern," which for now Treasury has limited to the People's Republic of China (including Hong Kong and Macau; collectively, China).

The Regulations largely track the Proposed Rule that Treasury released last summer,[2] although Treasury has also clarified certain definitions and identified a number of excepted investments that will be exempt from the Regulations' requirements. However, there are still several areas of ambiguity—importantly, there remains room for interpretation surrounding practical implementation of the relevant "knowledge" standard, and the actual mechanism for filing notifications is yet to be rolled out.

While the Regulations apply to a fairly limited universe of investments at present, we expect that they will still impose non-negligible diligence requirements on U.S. investors and may set

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the stage for more expansive Regulations on outbound investment in the future.

Background

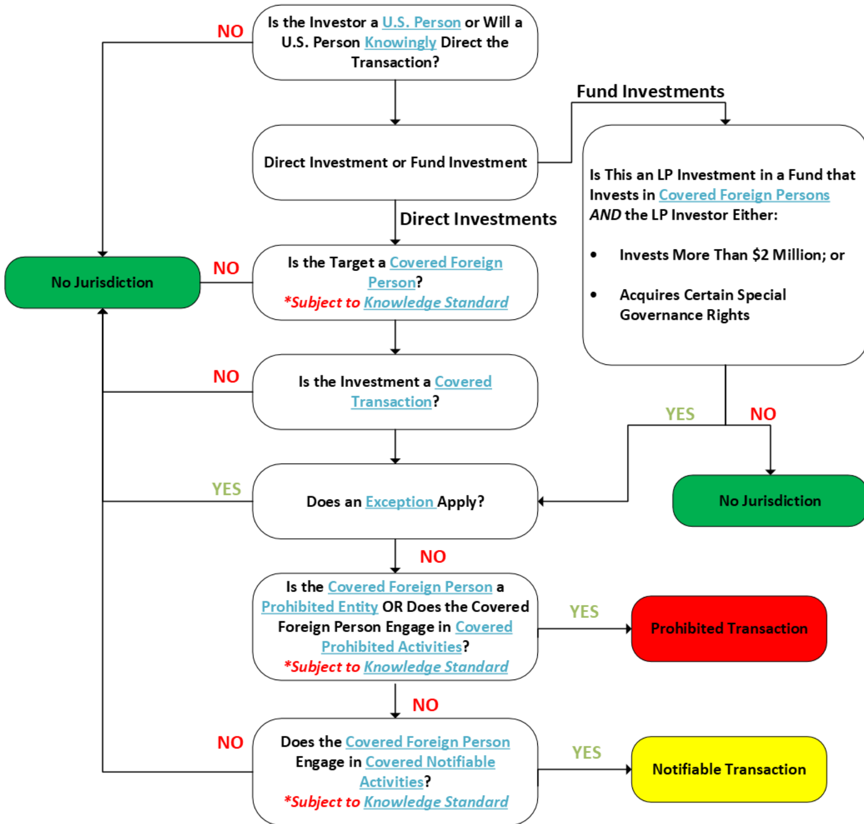
The Regulations implement an Executive Order (EO)[3] signed by President Joe Biden in August 2023 that called for the creation of a framework to prohibit or require notifications of certain investment activity involving certain countries of concern. Specifically, the EO charged the Secretary of the Treasury with promulgating regulations that would: (1) require "United States persons" to provide notification of specified types of transactions involving covered foreign persons ("notifiable transactions"), and (2) prohibit U.S. persons from engaging in specified types of transactions involving covered foreign persons ("prohibited transactions"). Since that time, Treasury has released both an Advanced Notice of Proposed Rulemaking[4] and the Proposed Rule that gave a sense of the possible scope of such regulations and solicited industry feedback. The Regulations released on October 28 are mostly consistent with the signals Treasury has sent via these preliminary notices, while incorporating numerous clarifications and tweaks based on feedback from the regulated community and for consistency with efforts by other government actors in the interim. The Final Rules, and the Regulations, mark the culmination of this rulemaking process, for now, and the advent of the United States' first outbound investment control regime. The Regulations will be published as 31 CFR Part 850.

Basics of the Regulations

Beginning on January 2, 2025, the Regulations: (1) prohibit certain transactions by U.S. persons involving covered foreign persons, and (2) require U.S. persons to notify Treasury of other categories of transactions involving covered foreign persons. Accordingly, investors will need to determine first whether they are part of the regulated population of investors. Assuming the investor is covered, they will next determine whether the target of the investment is a "covered foreign person," under the Regulations and, if so, whether the business' activities are described in the Regulations. If the answer to both is "yes," the transaction is a "covered transaction."

The prohibition and notification requirements imposed by the Regulations apply when a U.S. person has knowledge (at the time of the transaction) that the prospective transaction undertaken by a covered investor is a covered transaction.

Figure 1. Is My Transaction Prohibited or Notifiable?



Regulated Population: Who Must Comply?

As previewed in the Proposed Rule, the outbound investment prohibition and notification requirements will apply to "U.S. persons." This definition will include any U.S. citizen, lawful permanent resident, entity organized under the laws of the United States, including any foreign branch of any such entity, or any person in the United States.

In addition, in certain situations, the notification and prohibition requirements will extend to the activities of non-U.S. persons.

Specifically, where a U.S. person controls a non-U.S. person, the U.S. person must "take all reasonable steps to prohibit and prevent any transaction by a controlled foreign entity that would be a prohibited transaction if engaged in by a U.S. person."[5] And, U.S. persons are also prohibited from "knowingly directing a transaction by a non-U.S. person that the U.S. person knows at the time of the transaction would be a prohibited transaction if engaged in by a U.S. person."[6] Accordingly, U.S. persons that may control non-U.S. entities (such as foreign-domiciled investment funds) should ensure that they have implemented sufficient compliance and diligence mechanisms to fulfill their obligations under this new regulatory regime.

"Covered Foreign Persons" and "Persons of a Country of Concern"

As highlighted above, the Regulations as currently written primarily target investments that are made in China (inclusive of Hong Kong and Macau). As such, U.S. persons engaging in investments in China should be particularly attuned to the possibility that investment targets are engaging in "covered activities" (a category described below). However, under the definitions of "covered foreign person" and "person of a country of concern," the reach of the Regulations may in some circumstances extend to entities outside of China itself.

A "covered foreign person" is defined to include:

1. a "person of a country of concern" engaged in a covered activity;
   a. A "person of a country of concern" is defined to include:
      i. An individual who is a citizen or permanent resident of China (and not a U.S. citizen or permanent resident).
      ii. An entity that is organized under the laws of, headquartered in, incorporated in, or with a principal place of business in, China.
      iii. The government of China (inclusive of any political subdivision, agency or instrumentality,

or other subordinate entity, as well as persons acting on behalf of the Chinese government).

iv. Any entity that is 50 percent or more owned, individually or in the aggregate, by one or more of (a)-(c).

v. Any entity in which one or more of (i)-(iv) holds, individually or in the aggregate, at least 50 percent of the outstanding voting interest, voting power of the board, or equity interest.

2. a person who has a voting or equity interest, board seat, or contractual power to direct or cause the direction of the management or policies of a person of a country of concern where more than 50 percent of revenue, income, capital expenditures, and/or operating expenses relate to a person of a country of concern; and
3. a person of a country of concern that participates in a joint venture[7] with a U.S. person, where the U.S. person knows at the time of entrance into the joint venture that the joint venture will engage, or plans to engage, in a covered activity.

Accordingly, even where an investment target might be organized, or operate, outside of China, U.S. investors should be cognizant that either that target's subsidiaries (via the definition of a "covered foreign person") or its ownership (via the definition of a "person of a country of concern") could bring the target within the scope of these new Regulations. As discussed below with respect to the "knowledge" standard, investors should calibrate their diligence for all potentially relevant investments accordingly.

"Covered Transaction"

The Regulations define a "covered transaction" as the:

1. Acquisition of an equity interest or contingent equity interest;
2. Provision of a loan or a similar debt financing arrangement, where such debt financing affords or will afford the U.S. person an interest in profits of the covered foreign person, the right to appoint members of the board of directors (or equivalent) of the covered foreign person, or other

comparable financial or governance rights characteristic of an equity investment but not typical of a loan;

3. Conversion of a contingent equity interest into an equity interest, where the contingent equity interest was acquired by the U.S. person on or after January 2, 2025;
4. Acquisition, leasing, or other development of operations, land, property, or other *assets* in a country of concern that the U.S. person knows at the time of such acquisition, leasing, or other development will result in, or that the U.S. person plans to result in:
   a. The establishment of a covered foreign person; or
   b. The engagement of a person of a country of concern in a covered activity;
5. Entrance into a joint venture, wherever located, that is formed with a person of a country of concern, and that the subject U.S. person knows at the time of entrance into the joint venture that the joint venture will engage, or plans to engage, in a covered activity; or
6. Acquisition of a limited partner or equivalent interest in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund (in each case where the fund is not a U.S. person) that a U.S. person knows at the time of the acquisition likely will invest in a person of a country of concern that is in the semiconductors and microelectronics, quantum information technologies, or artificial intelligence sectors, and such fund undertakes a transaction that would be a covered transaction if undertaken by a U.S. person.

"Excepted Transactions"

Treasury clarified in the Final Rule certain investments are either categorically not "covered transactions," or are "excepted transactions" under the Regulations. Most notably, investments made as a "limited partner" in "a venture capital fund, private equity fund, fund of funds, or other pooled investment fund," that are either less than $2 million (aggregated across any investment and co-investment vehicles) or for which the limited partner receives "binding contractual assurance" that their capital will not be used to engage in a prohibited or notifiable transaction, are exempted from the requirements in the Regulations.

What Types of Investments Are Not Covered?

1. Publicly traded securities.
2. Derivatives.
3. Buyouts of country of concern ownership.
4. Intracompany transactions.
5. Binding capital commitments entered into prior to January 2, 2025.
6. Certain syndicated debt financing.
7. Employment compensation.

The Regulations condition most of these exceptions on the U.S. investor not receiving management or control rights that would be considered out of the ordinary for the investment (for instance, limiting the publicly traded securities exception to those where the investor's rights are limited to "standard minority shareholder rights"). The Regulations also provide for exceptions where the transaction involves a third country that has been determined to implement similar measures (potentially paving the way for multilateral outbound investment controls), or where the investor is granted an individualized "national security exemption" by Treasury.

"Covered Activities"

The relevant prohibited and notifiable activities are described in general terms in Table 1. For the most part, these activities track the activity scopes described in the Proposed Rule. One notable difference is the Regulations' treatment of AI systems. The Regulations combine the definitions of "artificial intelligence" and "AI system" from Executive Order 14110, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,"[8] indicating at least some coordination on the topic of AI across the executive branch. The Proposed Rule also had offered several possible computational thresholds at which to implement the Regulations' notification requirement for AI systems. The Final Rule chose to impose the notification requirement on entities working with AI systems trained using a quantity of computing power greater than 10^23 computational operations—the lowest (and therefore most expansive) possible threshold identified in the Proposed Rule. While Treasury acknowledged in the Final Rule that this threshold

will need to be revisited as technology advances, the selection of the more capacious threshold indicates a continuing concern with developing Chinese AI capabilities and counsels particular caution for U.S. investors entering this sector.

Table 1

Categories of Technologies and Products	**Covered Prohibited Activities**	**Covered Notifiable Activities**
Semiconductors and Microelectronics	Entities engaged in the development or production of any electronic design automation software for the design of integrated circuits or advanced packaging.[9] Entities that develop or produce (1) front-end semiconductor fabrication equipment[10] designed for performing volume fabrication of integrated circuits; (2) equipment for performing volume advanced packaging; or (3) commodity, material, software, or technology designed exclusively for use in or with extreme ultraviolet lithography fabrication equipment. Entities that design integrated circuits that meet or exceed the performance parameters in Export Control Classification Number 3A090.a,[11] or integrated circuits designed for operation at or below 4.5 Kelvin.	Entities engaged in the design, fabrication, or packaging of any integrated circuit that does not meet the parameters necessary to trigger a prohibition.

Categories of Technologies and Products	Covered Prohibited Activities	Covered Notifiable Activities
	Entities that package integrated circuits using advanced packaging techniques. Entities that design, sell, or produce supercomputers enabled by advanced integrated circuits that can perform at certain thresholds.	
Quantum Information Technologies	Entities engaged in the development of quantum computers or the critical components required to produce quantum computers, such as dilution refrigerators or two-stage pulse tube cryocoolers. Entities engaged in the development or production of quantum sensing platforms designed for, or intended to be used for, military, government intelligence, or mass surveillance end uses. Entities engaged in the development or production of quantum networks or communication systems designed for, or intended to be used for, networking to scale up capabilities of quantum computers, secure communications, or any other application that has any military, government intelligence, or mass surveillance end use.	None.

Categories of Technologies and Products	Covered Prohibited Activities	Covered Notifiable Activities
Artificial Intelligence Systems	Entities engaged in the development of AI systems exclusively designed for, or intended to be used for, military, government intelligence, or mass surveillance end uses. Entities engaged in AI systems trained using a quantity of computing power greater than 10^25 computational operations, or trained using primarily biological sequence data and a quantity of computing power greater than 10^24 computational operations.	Entities engaged in the development of AI systems that are designed for military, government intelligence, or mass surveillance end uses (but not exclusively). Entities engaged in the development of AI systems intended to be used for cybersecurity applications, digital forensics tools, penetration testing tools, or the control of robotics systems. Entities engaged in AI systems trained using a quantity of computing power greater than 10^23 computational operations.

Prohibited Entities

In addition to the covered activities described above, the Regulations also prohibit covered transactions in a covered foreign person that engages in any covered activities and is:

- Included on the Bureau of Industry and Security's (BIS) Entity List;[12]
- Included on the BIS Military End User List;[13]
- Meets the definition of "Military Intelligence End-User";[14]
- Included on the Department of the Treasury's list of Specially Designated Nationals and Blocked Persons (SDN List) or is owned 50 percent or more by an SDN;
- Included on the Department of the Treasury's list of Non-SDN Chinese Military-Industrial Complex Companies; or

- Designated as a foreign terrorist organization by the Secretary of State.

Notably covered transactions involving such foreign persons that are captured by the above are prohibited even if the activities engaged in by the covered foreign person would only make the transaction notifiable under the Regulations.

Penalty for Noncompliance

As with CFIUS and other national security and trade-related regimes, the penalties for violations track the civil and criminal penalties set forth in the International Emergency Economic Powers Act. That means that currently, violations risk (1) civil liability up to a statutory maximum of $368,136 (adjusted annually for inflation) or twice the value of the transaction, whichever is greater, or (2) criminal liability of up to $1,000,000 and imprisonment of up to 20 years per violation, if a breach is committed willfully. In addition to statutory penalties, the Regulations give Treasury the authority to nullify, void, or compel the divestment of prohibited transactions.

Notable Areas with Open Questions

"Knowledge Standard" and Diligence Requirements

As described above, the prohibition and notification requirements are operative when the U.S. person has "knowledge" that the prospective investment is a "covered transaction." This would mean that the U.S. person would need to have knowledge both that the target is a "covered person" and that the target engages in "covered activities." The Regulations' definition of "knowledge" is consistent with the definition used in other regulatory schemes[15] in that it encompasses both positive knowledge of a set of circumstances as well as "awareness of a high probability of a fact or circumstance's existence or future occurrence,"[16] and "[r]eason to know of a fact or circumstance's existence."[17]

The Final Rule clarifies that, for enforcement purposes, a determination of whether a U.S. person had the requisite "knowledge" at the time of an investment will hinge on whether the person engaged

in a "reasonable and diligent inquiry." The Regulations incorporate a non-exhaustive list of considerations that Treasury will use to determine (under a "totality of the facts and circumstances" standard) whether the "reasonable and diligent inquiry" occurred.

What Is a Reasonable Due Diligence Inquiry?

1. The inquiry a U.S. person has made regarding an investment target or other relevant transaction counterparty (such as a joint venture partner), including questions asked of the investment target or relevant counterparty, as of the time of the transaction.
2. The contractual representations or warranties the U.S. person has obtained or attempted to obtain from the investment target or other relevant transaction counterparty (such as a joint venture partner) with respect to the determination of a transaction's status as a covered transaction and status of an investment target or other relevant transaction counterparty (such as a joint venture partner) as a covered foreign person.
3. The efforts by the U.S. person as of the time of the transaction to obtain and consider available nonpublic information relevant to the determination of a transaction's status as a covered transaction and the status of an investment target or other relevant transaction counterparty (such as a joint venture partner) as a covered foreign person.
4. Available public information, the efforts undertaken by the U.S. person to obtain and consider such information, and the degree to which other information available to the U.S. person as of the time of the transaction is consistent or inconsistent with such publicly available information.
5. Whether the U.S. person purposefully avoided learning or seeking relevant information.
6. The presence or absence of warning signs, which may include evasive responses or nonresponses from an investment target or other relevant transaction counterparty (such as a joint venture partner) to questions or a refusal to provide information, contractual representations, or warranties.
7. The use of available public and commercial databases to identify and verify relevant information of an investment target or other relevant transaction counterparty (such as a joint venture partner).

These considerations are notably quite broad and, for the most part, do not set specific expectations for the level of diligence to be conducted by investors in advance of a given transaction. However, Treasury clearly expects relevant investors to conduct some level of pre-transaction diligence into whether the putative investment target conducts "covered activities." We expect that, to the extent specific measures are identified by the Regulations—for instance, the use of "public and commercial databases" or "contractual representations or warranties"—those specific measures set Treasury's minimum expectations for diligence activity under this regime. We anticipate that market practice will evolve quickly in this area.

Notification Process

The new outbound investment regime went into effect on January 2, 2025; however, Treasury has not yet released the actual tool that affected parties will use to file the required notifications. According to Treasury's Guidance Document that accompanied the Final Rule,[18] notifications will be accepted via "electronic filing." Treasury has stated that it "will post instructions on how to file . . . prior to the effective date of the Final Rule."

That said, the essential details of a notification are contained in the Regulations. Notifications to the newly created Office of Global Transactions within Treasury will be required within 30 days of the completion of a notifiable transaction. Under the Final Rule, notices of covered transactions must include the following information:

- The contact information of a representative of the U.S. person filing the notification who can communicate with Treasury regarding the filing;
- A description of the U.S. person (including its place of incorporation, principal place of business, and ownership);
- Post-transaction organizational charts of the U.S. person and covered foreign person that include the name, principal place of business, and place of incorporation of the intermediate and ultimate parent entities of both parties;
- A description of the commercial rationale for the transaction;
- A description of why the U.S. person determined the transaction is notifiable;

- The status of the transaction (including actual or expected completion date);
- The total transaction value in U.S. dollars;
- The aggregate equity interest, voting interest, and board seats of the U.S. person in the covered foreign person;
- Information about the covered foreign person (including its place of incorporation, principal place of business, ownership, officers, and directors);
- Identification and description of each of the covered activity or activities undertaken by the covered foreign person that makes the transaction a covered transaction, as well as a brief description of the known end use(s) and end user(s) of the covered foreign person's technology, products, or services; and
- Where the notice is submitted more than 30 days post-closing, a description of why the U.S. person lacked sufficient knowledge to timely submit (including a description of any pre-transaction diligence conducted).

Following notification, Treasury may engage in a question-and-answer process (which we anticipate would look similar to the comparable process under CFIUS) and may indicate conditions with which the U.S. person investor must comply within a specified timeframe. We expect that this process, in particular, will come into increased clarity as the system develops and standard practices crystallize.

Notes

* David Mortlock and Britt Mosman are partners at Willkie Farr & Gallagher LLP. David Levine and Ahmad El-Gamal are associates at the firm. The authors may be contacted at dmortlock@willkie.com, bmosman@willkie.com, dplevine@willkie.com, and ael-gamal@willkie.com, respectively.

1. "Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern," Department of Treasury (Oct. 28, 2024), https://home.treasury.gov/system/files/206/TreasuryDepartmentOutboundInvestmentFinalRuleWEBSITEVERSION_0.pdf; "Outbound Investment Security Program: Frequently Asked Questions," Department of the Treasury (Dec. 13, 2024); https://home.treasury.gov/system/files/206/Outbound-Investment-Security-Program-FAQs-12-13-2024.pdf.

2. "Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern," Department of Treasury (July 5, 2024), https://www.federalregister.gov/documents/2024/07/05/2024-13923/provisions-pertaining-to-us-investments-in-certain-national-security-technologies-and-products-in.

3. "Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern" (Aug. 9, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/08/09/executive-order-on-addressing-united-states-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern/.

4. "Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern," Department of Treasury (Aug. 14, 2023), https://home.treasury.gov/system/files/206/Provisions%20Pertaining%20to%20U.S.%20Investments%20in%20Certain%20National%20Security%20Technologies%20and%20Products%20in%20Countries%20of%20Concern.pdf.

5. A "controlled foreign entity" is a non-U.S. organized entity of which a U.S. person is a "parent"—i.e., general partner, managing member, investment adviser (in the case of a pooled investment fund), or owner of a 50% or greater voting interest or voting power of the entity's board.

6. A U.S. person "knowingly directs" a transaction when the U.S. person possesses authority to make or substantially participate in decisions made by the non-U.S. person, and exercises such authority to direct, order, or approve a transaction. Notably, the regulations include provisions identifying how a U.S. person who would otherwise have such authority can recuse themselves from specific activities.

7. Note that, in the Final Rule, Treasury, "decline[d] to define the term 'joint venture' . . . [i]nstead . . . refer[ring] to the plain English meaning of the term, i.e., as involving the contribution of capital and/or assets by two parties and the sharing of profits and losses. . . . [However], absent other facts, a 'joint venture' would not ordinarily result simply where there is a licensing arrangement, the sale or barter of goods and services, or resale of goods and services."

8. "AI system" from Executive Order 14110, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" (Oct. 30, 2023), https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

9. The term advanced packaging means to package integrated circuits in a manner that supports the two-and-one-half-dimensional (2.5D) or three-dimensional (3D) assembly of integrated circuits, such as by directly attaching one or more die or wafer using through-silicon vias, die or wafer bonding, heterogeneous integration, or other advanced methods and materials.

10. Front-end integrated circuit fabrication equipment includes equipment used in the production stages from a blank wafer or substrate to a

completed wafer or substrate. 15 CFR 744.23(a)(4), Note 1, https://www.ecfr.gov/current/title-15/part-744/section-744.23#p-744.23(a)(4).

11. At the time of drafting, this includes integrated circuits having one or more digital processing units having either of the following:

a.1. A "total processing performance" of 4800 or more, or
a.2. A "total processing performance" of 1600 or more and a "performance density" of 5.92 or more.

See Technical Notes 1-4 to ECCN 3A090 for descriptions of the calculation of "total processing performance" and "performance density."

12. Supplement No. 4 to 15 CFR part 744.

13. Supplement No. 7 to 15 CFR part 744.

14. 15 CFR 744.22(f)(2).

15. See, e.g., General Prohibition 10 of the Export Administration Regulations at 15 CFR 736.2(b)(10).

16. 31 CFR 850.216(b).

17. 31 CFR 850.216(c).

18. https://home.treasury.gov/news/press-releases/jy2690.

Adding Fuel to the Fires Calling for Permitting Reform: D.C. Circuit Decides Long-Lingering Issue of Council on Environmental Quality's Rulemaking Authority

Jason A. Hill, Jim Noe, Rafe Petersen, Jennifer L. Hernandez, Alexandra E. Ward, and Kamran Mohiuddin*

The U.S. Court of Appeals for the District of Columbia Circuit recently ruled that the Council on Environmental Quality lacks statutory authority to issue binding regulations under the National Environmental Policy Act. The authors of this article discuss the decision and its implications.

In a surprise decision likely to add further fuel to the fires calling for permitting reform and uncertainty to the environmental review process for federal funding and approval, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Council on Environmental Quality (CEQ) lacks statutory authority to issue binding regulations under the National Environmental Policy Act (NEPA). CEQ's "regulations" have formed the cornerstone of NEPA interpretation and implementation almost since its enactment more than a half-century ago.

Many of the familiar concepts to NEPA practitioners—such as the basic structure of environmental reviews through environmental impact statements (EIS), environmental assessments (EA), and categorical exemptions (CatEx), as well as the analysis of direct, indirect and cumulative impacts—all began as creatures of CEQ's earliest forays into promulgating NEPA regulations rather than from the original underlying statute. And while questions about CEQ's rulemaking authority have lingered in the background since NEPA's earliest days, only occasioning passing references from various courts, no court has sought to tackle that thorny issue directly

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until now, leaving many to question why now, since neither party to the case raised this issue in briefing.

Why Does This Decision Matter?

The short answer is that this major decision will impact anyone needing an environmental review for federal approvals or funding. NEPA practitioners are still pondering the consequences of this decision, and how it will impact recipients of federal funding and project proponents needing environmental reviews has yet to be fully determined. While each of the agencies has its own NEPA regulations, the CEQ rules have been the cornerstone of all NEPA review for decades. Clients with recently completed approvals that are likely to be challenged, those wanting to challenge recent agency decisions, or those that are currently going through environmental reviews should consult and work closely with attorneys focused on NEPA about the potential fallout from this decision.

Contextual Background

When President Richard M. Nixon signed NEPA into law in 1970, no one anticipated it would play such an outpaced role in the federal decision-making process or become the most litigated environmental statute in the nation.[1] The statute itself, as originally enacted, consisted of a few short pages, the thrust of which imposed an obligation on all federal agencies to prepare a "detailed statement" for "major Federal actions significantly affecting the quality of the human environment,"[2] and created CEQ in the Executive Office of the President of the United States.[3]

Notably absent from CEQ's statutory duties and functions was any mention of authority to issue regulations.[4] Instead, the U.S. Congress explicitly envisioned an advisory role for CEQ while directing each agency to develop its own regulations to comply with NEPA.[5] This statutory framework closely paralleled the Council of Economic Advisers (CEA) model—another executive office entity created to advise the president without regulatory authority.

Early judicial decisions acknowledged CEQ's limited advisory role. In fact, during U.S. Supreme Court litigation in the 1970s, the solicitor general explicitly advised the Court that CEQ's guidelines were not mandatory and "do not bind agencies of the Executive

branch."[6] This position reflected in *Kleppe v. Sierra Club* resulted in the Court making no mention of CEQ or its guidelines in its opinion.[7]

The transformation of CEQ from advisory body to regulatory agency occurred through two pivotal executive orders. First, President Nixon's Executive Order 11514 authorized CEQ to issue "guidelines" to assist agencies in preparing EISs. These guidelines focused on making the EIS process more useful to decision-makers and the public by reducing paperwork and emphasizing real environmental issues.[8] Importantly, these guidelines were explicitly nonbinding.

The watershed moment came with President Jimmy Carter's Executive Order 11991 in 1977,[9] which directed CEQ to issue regulations that would be binding on federal agencies. This led to CEQ's promulgation of the 1978 regulations—a massive new body of law that claimed to be "binding on all Federal agencies."[10] The regulations replaced "some seventy different sets of agency regulations" with a unified framework that created many of the familiar NEPA concepts in use today.[11]

Although the Supreme Court has noted that CEQ's 1978 regulations are entitled to "substantial deference," it has never squarely addressed CEQ's authority to issue binding regulations.[12] Over the decades, various courts have questioned this authority but always stopped short of directly addressing it. As the D.C. Circuit observed in its recent ruling, "it is quite remarkable that this issue has remained largely undetected and undecided for so many years in so many cases."

Recent History of NEPA Regulations

Upon the issuance of the 1978 regulations and until 2020, the regulatory landscape remained largely unchanged, with notable exceptions such as the removal of the "worst case analysis" requirement following the Supreme Court's decision in *Robertson v. Methow Valley Citizens Council*.[13] Although the Supreme Court acknowledged that the CEQ regulations were entitled to "substantial deference," it never fully embraced or addressed CEQ's authority to issue binding regulations.[14] What developed over these decades was a steady expansion of environmental review scope and documentation that diverged significantly from early CEQ guidance

suggesting EAs could be completed in three months, with a suggested page length of 10 to 15 pages, and that even complex EISs could be completed within 12 months.[15] A 2020 CEQ review of EIS timelines from 2010 to 2018 found that across all federal agencies, the average completion time for 1,276 EISs took 4.5 years, with 25 percent taking more than six years to complete.[16]

The 2020 regulations marked the first comprehensive revision of CEQ's NEPA implementation framework since 1978. These regulations sought to establish a ceiling for NEPA requirements, requiring agencies to adjust their regulations accordingly. The revisions aimed to streamline the process by incorporating decades of judicial interpretation into regulatory text.

The Biden administration's response came in two phases. Phase 1 regulations made targeted amendments to the 2020 rules rather than wholesale revisions. Key changes included converting CEQ's regulations from a ceiling to a floor for agency NEPA requirements and reverting to the 1978 definition of environmental "effects" and "impacts."

Before CEQ could release its anticipated Phase 2 regulations, Congress intervened with the first substantial amendments to NEPA since its enactment. The federal Fiscal Responsibility Act (FRA) significantly codified several key provisions from the 2020 regulations into statute, including the basic framework of EIS, EA, and CatEx reviews—marking the first time Congress had explicitly recognized these long-standing administrative creations in the statute itself.[17] In addition, Congress codified timelines for completion of EISs (two years) and EAs (one year) and incorporated an entirely new cause of action under NEPA to allow for project proponents to enforce these timelines. It also set page limits—150 pages for EISs, 300 pages for EISs with extraordinary complexity, and 75 pages for EAs.

Eventually, the final Phase 2 proposal, issued earlier this year, highlighted CEQ's continued expansion of authority, incorporating substantive requirements for environmental justice and climate change into what had historically been recognized as a procedural statute. Several comments on this effort specifically challenged CEQ's regulatory authority. As captured in comments submitted by the Center for Environmental Accountability: "At the center of this procedural hypertrophy lay the Council on Environmental Quality. . . . NEPA did not delegate regulatory authority to CEQ—but CEQ, citing Executive Orders, purported to exercise it anyway."

CEQ's response to these authority challenges relied heavily on judicial precedent, citing eight circuit court decisions describing its regulations as "binding" or "mandatory." However, as the D.C. Circuit would later observe, none of these decisions had squarely addressed the fundamental question of CEQ's authority to issue binding regulations in the first place. Ultimately, CEQ concluded in its response to these comments that it disagreed with the assertions that it lacked regulatory authority.

The Current Case

Therefore, while the issue of CEQ's rulemaking authority has lingered for decades, the D.C. Circuit's recent ruling on CEQ's authority emerged unexpectedly from a challenge to air tour management over national parks in the San Francisco Bay Area. Although the case ostensibly centered on whether agencies could use existing interim flight operations as an environmental baseline, the court seized the opportunity to address what it called the "quite remarkable" fact that CEQ's regulatory authority had "remained largely undetected and undecided for so many years."[18]

Writing for the majority, Judge A. Raymond Randolph held that "the CEQ regulations, which purport to govern how all federal agencies must comply with [NEPA], are ultra vires."[19] The court's analysis rested on three key foundations:

1. The court found no statutory basis for CEQ's regulatory authority. "The provisions of NEPA provide no support for CEQ's authority to issue binding regulations," the court explained.[20] "No statutory language states or suggests that Congress empowered CEQ to issue rules binding on other agencies—that is, to act as a regulatory agency rather than as an advisory agency."[21] Instead, NEPA envisioned CEQ playing a role similar to the CEA—advising the president but not issuing binding regulations.
2. The court rejected the argument that presidential executive orders could create such authority. President Carter's Executive Order 11991 represented, in the court's view, "the most ambitious presidential foray into the nation's environmental protection effort: the transformation of the CEQ from an advisory entity into a regulatory agency."[22]

The court found this transformation fundamentally incompatible with separation of powers principles, citing *Youngstown Sheet & Tube Co. v. Sawyer* for the proposition that the U.S. Constitution does not permit the president to seize for himself the "law-making power of Congress."[23]

3. The court addressed the decades of judicial decisions according "substantial deference" to CEQ regulations. The majority noted that while courts had routinely cited and applied CEQ regulations, none had actually analyzed CEQ's authority to issue them. As the court observed, "publication in the C.F.R. is no measure of an agency's authority to issue rules that appear there."[24] Further, the decision questions whether the Supreme Court's prior "*Chevron*-like statement" on the "substantial deference" entitled to CEQ's regulations remains credible in light of the *Loper Bright Enterprises v. Raimondo* ruling.[25]

The court emphasized that its ruling does not undermine NEPA's environmental protections. Individual agencies retain their statutory authority to implement NEPA through their own regulations, and courts will continue to enforce NEPA's requirements. What changes is CEQ's role—returning to its original congressional design as an advisory body rather than a regulatory agency.

Impacts

The D.C. Circuit's ruling adds significant uncertainty to environmental reviews and federal approvals while raising fundamental questions about the future of NEPA implementation. The impacts of this decision will reverberate through several key areas.

Marin Audubon's Future in the Courts

Many expect a petition for rehearing en banc to be filed by either the environmental plaintiffs or the federal government, or both parties to the case, but whether the full circuit takes up the matter, as well as how other courts will respond, remains an open question. However, the D.C. Circuit may not have to wait for a request for rehearing in *Marin Audubon* to decide the issue, given that parties in *City of Port Isabel v. FERC* already filed a letter under

Federal Rules of Appellate Procedure 28(j) citing the decision in support of a petition for rehearing in that case.[26]

In addition, a federal judge already granted a request for leave to file a notice of supplemental authority with regard to the *Marin Audubon* decision in a case brought by several states challenging the Phase 2 regulations.[27]

The fight may ultimately be decided by the Supreme Court sooner rather than later, with several amicus briefs raising the issue of CEQ's rulemaking authority in the *Seven County Infrastructure Coalition v. Eagle County*, a NEPA case currently slated on its docket in the current term.[28]

Immediate Effects on Environmental Reviews

The question of CEQ's regulatory authority creates uncertainty for projects currently undergoing NEPA review. Although the FRA amendments might have codified the basic framework of EIS, EA, and CatEx, many long-standing procedural details previously governed by CEQ regulations now lack clear authority. This includes:

- Scoping procedures,
- Public participation processes,
- Key definitions,
- Environmental justice considerations, and
- Climate change analysis requirements.

The need for federal agencies and project proponents to grapple with these issues in ongoing environmental reviews is not diminished by the *Marin Audubon* decision, and environmental reviews for permitting decisions could be delayed as agencies develop solutions in real time while struggling to keep the new statutory deadlines for completion. Further, agencies that have relied on CEQ's regulations and subsequent revisions to complete environmental reviews may need to revisit their decisions and review their own NEPA regulations. It is unclear if such agency-specific regulations can even stand on their own, as many are limited in scope.

Agency NEPA Regulations

The decision comes at a time when administrations will be changing in the new year, along with changes to policy focus.

Although many anticipated another round of potential changes to CEQ's regulations with the subsequent administration, how this decision impacts the options available to the new administration remains uncertain and provides new options. A new administration may still try to coordinate NEPA regulations through the CEQ, or it could simply bypass relying on CEQ and focus efforts at the departmental level for each federal agency.

The relationships between individual agency NEPA regulations and CEQ's now-invalidated regulations also presents complex questions. As noted in the *Marin Audubon* decision, a "wrinkle remains"—many agencies incorporated or adopted CEQ's regulations by reference but not necessarily the subsequent revisions. Thus, a question remains on whether an agency adopting CEQ's regulations would be a permissible exercise of its own rulemaking authority, since it has been held in other contexts that an agency cannot outsource its rulemaking authority to another entity that lacks that authority.[29] And, even if an agency has adopted the CEQ regulations in the past, would that extend to any revision of the CEQ regulations?

In the future, federal agencies may diverge significantly in their NEPA implementation, as each department could theoretically select from CEQ's various regulatory approaches or choose to chart its own course. Regardless, new regulations should be anticipated, and interested parties will want to track and comment upon future NEPA rulemakings coming out of the agencies.

CEQ's Future Role

The ruling fundamentally alters CEQ's role in NEPA implementation. As an advisory body, CEQ may continue to advise the president on environmental policy, which could include providing guidance and recommendations on NEPA implementation, as well as coordination among agencies. In fact, the FRA amendments now provide a role for CEQ in designating a lead agency for NEPA reviews.[30] However, CEQ's ability to issue binding regulations—either setting a floor or ceiling for agencies or to require that agencies follow specific procedures—and its authority to impose substantive requirements for analytical approaches of impacts or alternatives must now be questioned. It also remains to be seen whether Congress will tackle permitting reform with further

amendments to NEPA and if any statutory changes would address CEQ's rulemaking authority.

This shift raises uncertainty about CEQ's ability to ensure consistent NEPA implementation across agencies and its role in addressing emerging environmental challenges, particularly when it comes to the new regulatory provisions surrounding analysis of impacts concerning climate change and environmental justice.

Practical Considerations for Project Proponents

Project proponents face several immediate challenges:

1. *Projects with Pending Reviews*
   - Reviews substantially completed under existing procedures will likely proceed toward meeting the new statutory deadlines.
   - Agencies may need to supplement documentation to rely more heavily on their own NEPA regulations.
   - Timeline uncertainties may increase for environmental reviews initiated under the current CEQ regulations as agencies wrestle with adjusting their procedures to account for this court decision.
2. *Future Projects*
   - Increased emphasis on agency-specific NEPA procedures should be expected.
   - Projects may face different requirements depending on the lead agency.
   - Future projects may need to navigate inconsistent approaches among cooperating agencies.
3. *Legal Strategy*
   - There will need to be an increased importance placed on understanding individual agency NEPA regulations and baseline statutory authority.
   - The need to track agency-specific guidance and precedent should be carefully considered.
   - There may be a potential for new litigation over agency-specific NEPA procedures.

Conclusion

The D.C. Circuit's ruling fundamentally alters the landscape of federal environmental reviews and creates significant uncertainty for project proponents. Companies and organizations navigating federal approvals or funding will need experienced counsel to help them adapt to this rapidly evolving situation.

Notes

* The authors, attorneys at Holland & Knight LLP, may be reached at jason.hill@hklaw.com, jim.noe@hklaw.com, rafe.petersen@hklaw.com, jennifer.hernandez@hklaw.com, alexandra.ward@hklaw.com, and kamran.mohiuddin@hklaw.com, respectively.

1. Holland & Knight attorneys recently collaborated with the Breakthrough Institute to compile and analyze 387 NEPA cases brought in federal appellate courts over a 10-year period, indicating that NEPA litigation overwhelmingly functions as a form of delay, as most cases take years before courts ultimately rule in favor of the defending federal agency.

2. 42 U.S.C. § 4332(2)(C).

3. 42 U.S.C. § 4342.

4. 42 U.S.C. § 4344.

5. 42 U.S.C. §§ 4333, 4344.

6. See Marin Audubon Soc'y v. Fed. Aviation Admin., No. 23-1067, 2024 WL 4745044, at *5 (D.C. Cir. Nov. 12, 2024) citing to Brief for the Petitioners at 31 n.24, Kleppe v. Sierra Club, 427 U.S. 390 (1976) (Nos. 75-552 & 75-561.

7. See id.

8. See Scott C. Whitney, The Role of the President's Council on Environmental Quality in the 1990s and Beyond, 6 J. Envtl. L. & Litig. 81, 91 (1991).

9. Executive Order 11991 was recently revoked in Section 5 of the "Unleashing America's Energy" Executive Order signed by President Trump on January 20, 2025. Among other NEPA-related matters in President Trump's January 2025 Executive Orders, this revocation further calls into question CEQ's role and authority under NEPA.

10. See id. at 86-87.

11. See Marin Audubon Soc'y, 2024 WL 4745044, at *8.

12. See Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

13. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354 (1989).

14. See Andrus, 442 U.S. at 358.

15. See CEQ's Forty Most Asked Questions (March 23, 1981) at 35 (time required for NEPA process) and 36a (page guidelines), https://www.

energy.gov/nepa/articles/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.

16. See CEQ's Report on EIS Timelines (2010-2018) (June 12, 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

17. See "Council on Environmental Quality Substantially Rewrites NEPA Regulations," The Journal of Federal Agency Action, September-October 2024.

18. See Marin Audubon Soc'y, 2024 WL 4745044, at *7.

19. See id. at *4.

20. See id. at *7.

21. See id.

22. See id. at *5.

23. See id. at *4.

24. See id. at *7.

25. See id. at *17.

26. See City of Port Isabel et al. v. FERC, case number 23-1174, in D.C. Circuit.

27. See State of Iowa et al. v. CEQ, case number 24-0089, in District of North Dakota.

28. See Seven Cnty. Infrastructure Coal. v. Eagle Cnty., No. 23-975 (U.S. cert. granted June 24, 2024).

29. See Marin Audubon Soc'y at *20.

30. 42 U.S.C. § 4336a(a)(4), (5).

NLRB Reinstates “Clear and Unmistakable Waiver” Standard for Unilateral Changes

Eve I. Klein, Haley Ferise, Jesse Stavis, and Elizabeth Mincer*

The authors of this article discuss Endurance Environmental Solutions, LLC, *a National Labor Relations Board (NLRB) decision, in which the NLRB reverted to its previous standard for evaluating whether a union has waived its right to bargain over changes to terms and conditions of employment that an employer wishes to make during the term of a labor agreement. The decision will almost certainly not be the Board’s last word on this subject.*

In *Endurance Environmental Solutions, LLC*,[1] the National Labor Relations Board (NLRB) reverted to its previous standard for evaluating whether a union has waived its right to bargain over changes to terms and conditions of employment that an employer wishes to make during the term of a labor agreement. The Biden Board rejected the “contract coverage standard” embraced by the Trump Board and reinstated a “clear and unmistakable waiver standard.” The immediate effect will be to make it more difficult for unionized employers to make unilateral changes. Whether the new standard will be applied retroactively remains an open question.

The *MV Transportation* Standard

The basic question that the Board addressed in *Endurance Environmental Solutions* concerns an employer’s obligation to bargain over a proposed change to a term or condition of employment. Before 2019, the Board applied a clear and unmistakable waiver standard, which required an employer to show that a union had explicitly waived the right to bargain over a particular issue. By contrast, in *MV Transportation*,[2] the Board took a different approach and embraced what is known as a contract coverage standard. Under this standard, the Board would consider whether the parties’ agreement implicitly allowed for the change that the employer was proposing to make. That is, if the parties had already bargained

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over an issue during contract negotiations, the Board would allow an employer to make changes without bargaining over them again.

Under *MV Transportation*, the Board would first "determine whether the parties' collective-bargaining agreement covers the disputed unilateral change ... giv[ing] effect to the plain meaning of the relevant contractual language [and] applying ordinary principles of contract interpretation." If the Board found that the challenged "act falls within the compass or scope of contract language that grants the employer the right to act unilaterally," then the employer could so act. If, on the other hand, the agreement did not cover the proposed action, then the employer would generally have to bargain over it. The *MV Transportation* Board reasoned that the clear and unmistakable waiver standard undermined contractual stability and posed a risk of conflicting decisions by the NLRB and the courts.

The Board's Reasoning for Overturning *MV Transportation*

In *Endurance Environmental Solutions*, the Board reasoned that the decision in *MV Transportation* was premised on "erroneous assumptions." The Board argued that, far from interfering with the right to contract, the clear and unmistakable waiver standard honored the parties' intentions by requiring them to explicitly identify those issues that would no longer be subject to mandatory bargaining. In addition, the Board majority argued that the clear and unmistakable waiver rule provides a clear and uniform standard that reduces the risk of uncertain outcomes.

The Board attacked *MV Transportation* on a number of grounds. It took issue with that decision's assertion that the clear and unmistakable waiver standard favors unions over management, that it is "in practice [] all but impossible to meet," that it undermines the authority of arbitrators and that it is inconsistent with the rulings of circuit courts of appeals, several of which have explicitly embraced a contract coverage standard. The Board noted that while the clear and unmistakable waiver standard sets a high bar, it is consistent with how the Board and courts have treated other purported waivers of statutory rights.

In support of its revival of the clear and unmistakable waiver standard, the Board argued that the standard provides "stability

to collective-bargaining relationships by providing consistency and respite from change to *both* parties" (emphasis in original). Additionally, the Board argued that the contract coverage standard impedes bargaining by encouraging employers to "insist on the broadest language possible." Finally, the NLRB reasoned that the contract coverage standard destabilizes relations between the employer and the union, as well as between the union and its member-employees. According to the Board, any changes an employer may make without bargaining cause employees to lose morale and become less likely to organize.

Application in *Endurance Environmental Solutions*

In *Endurance Environmental Solutions*, the employer, a transporter of trash to landfills, determined that it was in its best interest to install cameras monitoring driver behavior in response to unsafe driving and collisions. The management rights language in the employer's collective bargaining agreement with the union included broad language allowing the employer to "implement changes in equipment."

Despite the management rights provision, the union filed an unfair labor practice charge against the employer for allegedly violating Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by refusing to bargain. The administrative law judge (ALJ) dismissed this portion of the union's charge under *MV Transportation*'s contract coverage standard. The ALJ found that the union's waiver of the right to bargain over "changes in equipment" in the management rights provision of the collective bargaining agreement covered the employer's decision to install the safety cameras. Accordingly, the judge also found that the union had waived the right to bargain over the effects of the installation of the safety cameras in the management rights provision.

In applying the revived clear and unmistakable waiver standard, the Board found that the management rights clause stated a general proposition and that recognizing the employer's broad discretion to change equipment was not a clear and unmistakable waiver of the right to bargain over this particular change. In order for there to be a clear and unmistakable waiver, the Board reasoned, there must be evidence that the specific issue was "fully discussed and

consciously explored." The employer in this case was not able to provide such evidence.

What This Means for Employers

Because the Board has not determined whether the revived clear and unmistakable standard will be applied retroactively or prospectively, employers who have cases pending before the NLRB should begin gathering evidence that they actually relied on the *MV Transportation* standard in making unilateral changes. The Board has indicated that actual reliance on *MV Transportation* may be considered in pending cases. Experienced labor counsel can provide advice on what evidence is helpful and otherwise assist employers prepare to make their cases.

Moving forward, employers should consider the implications of any unilateral changes they may wish to make during the term of a collective bargaining agreement under a clear and unmistakable waiver standard. This is to say, employer action will be under significantly increased scrutiny based on contractual language and bargaining history.

Finally, it is important to note that *Endurance Environmental Solutions* will almost certainly not be the Board's last word on this subject. This is just one of the Biden Board's decisions that is likely to face scrutiny now that Republicans have control under the Trump administration.

Notes

* The authors, attorneys at Duane Morris LLP, may be reached at eiklein@duanemorris.com, hferise@duanemorris.com, jstavis@duanemorris.com, and emincer@duanemorris.com, respectively.

1. 373 NLRB No. 141 (2024).
2. 368 NLRB No. 66 (2019).

Trump Administration 2.0: What Government Contractors Should Expect

David R. Johnson, Jamie F. Tabb, Tyler E. Robinson, Elizabeth Krabill McIntyre, Leslie Edelstein, Gabrielle Gunshol, and Madison Torrez*

During his campaign, Donald Trump publicly discussed the implementation or removal of several policies that could significantly impact government contractors. The authors of this article discuss the potential changes that could lead to a different landscape in government contracting over the next four years.

Although the Trump administration is taking shape, there is still a lot of uncertainty around the specifics of the administration's priorities. However, during his campaign, Donald Trump publicly discussed the implementation or removal of several policies that could significantly impact government contractors. If the administration does indeed follow through on some of its stated goals, government contractors should be prepared to see changes to certain policies enacted through the Federal Acquisition Regulation (FAR), to governmental operations and contracting opportunities, and to governmental spending. Specifically, changes are expected in the areas of minimum wage, affirmative action, and environmental compliance obligations, as well as a renewed focus on "Buy American" policies. And based on statements made by the administration, we also expect defense spending to increase while non-defense spending may decrease. Together, all of these changes could lead to a different landscape in government contracting over the next four years.

Policy Initiatives Incorporated Through FAR

Minimum Wage

There has been a recent flurry of activity with regard to federal contractor minimum wage requirements that will need to be

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addressed by the incoming administration. The previous Trump administration effectively left an Obama administration executive order in place that required an increased minimum wage for certain employees of federal contractors. The Biden administration then issued Executive Order (EO) 14026,[1] increasing the minimum wage for federal contractors even further. However, recent litigation has created a circuit split as to whether EO 14026 exceeded the president's authority under the Federal Property and Administrative Services Act (FPASA), and thus, whether such orders and subsequent minimum wage implementations are lawful. In *Bradford v. U.S. Department of Labor*,[2] the U.S. Court of Appeals for the Tenth Circuit ruled that EO 14026 was within the scope of the FPASA, but more recently in *Nebraska v. Su*,[3] a majority composed of two Trump-appointed judges ruled in a split U.S. Court of Appeals for the Ninth Circuit decision that the minimum wage requirement went beyond the president's authority. The new Trump administration has generally indicated that it intends to raise wages for American workers. But as of the date of publication, the administration has not yet commented on whether it intends to keep the current minimum wage requirement[4] for federal contractors in place or to defend its authority under the FPASA to issue EOs relating to minimum wages for contractor employees. Given the split between the circuits (and there is a similar case still pending before the U.S. Court of Appeals for the Fifth Circuit), and the administration's focus on maintaining executive power, it seems likely that there will be further activity in the minimum wage area. But it also seems likely that the current trajectory of an increasing minimum wage for federal contractors will change.

Social Collateral Policies

President Trump has stated his belief that the federal government imposes bias against certain individuals and businesses through Diversity, Equity, and Inclusion programs. It is likely that his administration will reinstate some version of his previous EO 13950,[5] "Combating Race and Sex Stereotyping," which prohibited the inclusion of "race or sex stereotyping" and "race or sex scapegoating" in contractors' diversity and inclusion policies and training. This EO was subsequently revoked[6] by former President Biden. Inspired by the Supreme Court's decision in *Students for Fair*

Admissions, Inc. v. President and Fellows of Harvard College,[7] which struck down race-conscious affirmative action in college admissions, Trump could also rescind the affirmative action requirements of EO 11246,[8] "Equal Opportunity." That EO, which is implemented via FAR clause 52.222-26 and other related clauses, requires contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin." The new administration could also take aim at requirements for contractors to maintain affirmative action programs for veterans and individuals with disabilities, although significant changes to these requirements would require action by Congress.

Finally, the new administration could make changes to the patchwork of programs providing preferences in federal contracting and subcontracting to certain types of contractors, as these programs would likely be viewed by the incoming administration as a type of affirmative action. This includes the Small Business Administration's 8(a) program, which provides a preferential status to small businesses owned and controlled by "socially and economically disadvantaged individuals," as well as the Historically Underutilized Business Zone (HUBZone) Program, the Indian Incentive Program, and others.

Environmental Regulations

From the beginning, the Biden administration emphasized the actions of the federal government and the use of federal procurement in addressing climate change issues. This included the issuance of several EOs directing the federal government to take numerous actions relating to sustainability and environmental impacts. These included EO 14008,[9] "Tackling the Climate Crises at Home and Abroad"; EO 14030,[10] "Climate-Related Financial Risk"; and EO 14057,[11] "Catalyzing Clean Energy Industries and Jobs through Federal Sustainability." Under these EOs, the Federal Acquisition Regulatory Council published several proposed and final rules, which included substantial revisions to FAR Part 23 and FAR 52.223-23, which require agencies to consider sustainable products and services over nongreen products when available.

Perhaps the highest profile proposed rule was FAR Case 2021-015,[12] Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, which would require federal government contractors to disclose their annual greenhouse gas emissions. However, Trump has repeatedly stated that he intends to eliminate the Biden administration's climate change actions, including those relating to carbon emissions. This means it is likely that he will revoke Biden's EOs on climate change, and it is nearly certain that the proposed greenhouse gas disclosure rule will be abandoned. Although possible, it seems less likely that the new administration will revert FAR Part 23 back to its previous form (or eliminate it entirely), but it seems a safe bet that there will be significantly less emphasis on sustainability and environmental matters under the new regime.

Buy American

In his platform,[13] Trump indicated that he intends to increasingly prioritize domestic manufacturing. Specifically, items that are considered "critical" to the American supply chain will likely be required to be manufactured domestically. In some ways, these efforts could be consistent with those of the Biden administration, which made significant changes to strengthen the implementation and enforcement of the Buy American Act (BAA),[14] which generally requires contractors to deliver U.S.-manufactured supplies and use U.S.-manufactured construction materials on federal contracts. For example, the incoming administration could attempt to further strengthen and expand the reach of the BAA by limiting exemptions for products manufactured in countries that have entered into free trade agreements with the United States that require nondiscriminatory treatment in government procurement. Such an action would be consistent with Trump's stated desire to reform America's current trade agreements to favor U.S. manufacturing and restrict overseas manufacturing. The incoming administration could also attempt to "one-up" the Biden administration by further increasing the required percentages of domestic content for supplies and construction materials to qualify as BAA-compliant, or further limiting the availability of BAA waivers. In addition, in his platform,[15] Trump described a "Buy American and Hire American" policy that will "[ban] companies that outsource jobs from doing

business with the Federal Government." If he follows through on this policy proposal, the Trump administration could push through new procurement regulations and FAR clauses limiting opportunities for contractors that employ workers overseas or that rely on foreign subcontractors or suppliers.

Increased Defense Spending

With Trump regaining the presidency and Republicans in control of both houses of Congress, government contractors reasonably can expect an increase in defense spending. Trump's platform[16] indicates a desire to build an Iron Dome Missile Defense Shield for the United States, in addition to "reviving our Defense Industrial Base" and building a "bigger, better, and stronger" military. The platform also includes a plan to invest in cutting-edge research and advanced technologies. All of these statements point to the likelihood of increased defense spending, especially on military technologies, which would be consistent with the increases witnessed during the previous Trump administration. At the same time, Trump has consistently endorsed an "America First" message that will likely result in a more isolationist, domestic-focus national security and foreign relations policy. As a result, the United States is likely to cut back on its support to Ukraine and potentially other allies, thereby potentially reducing sales for certain defense contractors.

Department of Governmental Efficiency

President Trump has appointed Elon Musk and Vivek Ramaswamy to lead the newly created Department of Government Efficiency (DOGE). DOGE will not be an official government agency, so it is not yet clear how it actually will operate, but right now it is envisioned that DOGE will serve in an advisory capacity to the president and the Office of Management and Budget. As per statements by both Musk and Ramaswamy, DOGE's objective is to reduce unauthorized discretionary spending, programs they deem inconsistent with congressional intent, and the federal workforce. They have indicated their goal is to cut $500 billion in spending and to use the president's authority to implement reductions in force—as opposed to the firing of individual government employees—to reduce the federal workforce.

These actions—if implemented—could have a twofold effect on government contractors. On the one hand, reductions in force of government employees will likely slow the functioning of affected agencies. One consequence of this could be an increase in the time contractors spend waiting on their government customers to implement contractual administrative actions or to respond to contractor concerns. It also likely will slow the procurement process, as the limited pool of government employees would also need to focus on administering existing contracts and may not be able to dedicate sufficient time to the process of evaluating proposals and making award decisions. On the other hand, reductions in force may result in increased contracting opportunities for contractors, as the federal government looks to fill gaps in its performance by outsourcing more tasks to private contractors.

Notes

* David R. Johnson, Jamie F. Tabb, Tyler E. Robinson, Elizabeth Krabill McIntyre, and Leslie Edelstein are attorneys at Vinson & Elkins LLP. Gabrielle Gunshol and Madison Torrez are law clerks at the firm. The authors may be contacted at drjohnson@velaw.com, jtabb@velaw.com, trobinson@velaw.com, emcintyre@velaw.com, ledelstein@velaw.com, ggunshol@velaw.com, and mtorrez@velaw.com, respectively. This article was originally written in December 2024.

1. https://www.federalregister.gov/documents/2021/04/30/2021-09263/increasing-the-minimum-wage-for-federal-contractors.

2. https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010111040629.pdf.

3. https://cdn.ca9.uscourts.gov/datastore/opinions/2024/11/05/23-15179.pdf.

4. https://www.federalregister.gov/documents/2022/01/26/2022-01507/federal-acquisition-regulation-increasing-the-minimum-wage-for-contractors.

5. https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping.

6. https://www.federalregister.gov/d/2021-01753/p-42.

7. https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf.

8. https://archives.federalregister.gov/issue_slice/1965/9/28/12315-12325.pdf.

9. https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad.

10. https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.

11. https://www.federalregister.gov/documents/2021/12/13/2021-27114/catalyzing-clean-energy-industries-and-jobs-through-federal-sustainability.

12. https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial.

13. https://rncplatform.donaldjtrump.com/.

14. 41 U.S.C. Chapter 83.

15. https://rncplatform.donaldjtrump.com/.

16. https://rncplatform.donaldjtrump.com/.

Trump's Pro-Crypto Agenda: Will Antitrust Regulators Keep Decentralized Cryptocurrency Competitive?

Evan Miller*

Excitement is building in the blockchain and cryptocurrency industries. Industry leaders are hopeful that the pro-cryptocurrency stances held by President Trump and his appointees will foster a regulatory environment that supports growth and innovation in decentralized technology. The author of this article explores the topic.

As former President Donald Trump returns to office, excitement is building in the blockchain and cryptocurrency industries, fueled by the administration's early signals of support for digital assets and Web3 technologies, including the appointment of crypto advocate Paul Atkins to chair the Securities and Exchange Commission. Industry leaders are hopeful that the pro-cryptocurrency stances held by President Trump and his appointees will foster a regulatory environment that supports growth and innovation in decentralized technology.

If Trump's first administration is any indicator, this renewed focus also will draw the attention of antitrust authorities, who may seek to balance this burgeoning sector's potential against the perceived dominance of more established technologies. Trump's statement regarding his nomination of Gail Slater as the head of the Antitrust Division at the Department of Justice (DOJ) confirms that the Trump administration's antitrust enforcement will focus on protecting "Little Tech," which includes blockchain and Web3 start-ups.

Potential Role for Antitrust Enforcers

The potential role for antitrust enforcers in President Trump's pro-crypto agenda is not new. In a 2020 speech,[1] former Assistant

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Attorney General Makan Delrahim, Trump's top antitrust enforcer at the DOJ during his first term, emphasized the need for antitrust enforcers actively to protect competition in the blockchain industry. Delrahim warned against allowing "entrenched monopolists" to stifle the threat of blockchain technology to their business models. Delrahim also launched an initiative to educate DOJ staff attorneys about blockchain technology through an online course at the MIT Sloan School of Management. After the end of Trump's first term, Delrahim continued speaking about competition issues facing the blockchain industry while in private practice. Notably, Delrahim reportedly advised Trump's transition team on antitrust matters. The Federal Trade Commission (FTC) also established a Blockchain Working Group[2] during Trump's first administration, signaling a broader interest in the technology's implications for competition.

This interest in blockchain's impact on competition extended into the Biden administration. President Biden's 2022 executive order on digital assets[3] encouraged the DOJ and FTC to examine the potential effects of digital asset growth on competition policy. However, the industry's relatively stagnant growth during the Biden presidency offered few opportunities for antitrust enforcers to delve into the intersection of blockchain and competition law. Industry leaders attribute this stagnation to a lack of regulatory clarity and perceived over-enforcement of securities and commodities laws, which they believe stifled investment, development, and innovation.

Trump has pledged to reduce regulation of digital assets in his second term—most significantly through the appointment of a crypto advocate in Paul Atkins as the chief industry regulator—a move expected to stimulate investment and activity in the sector. This scenario could position the antitrust agencies as key players in shaping the competitive landscape.

Potential Focus Areas for the FTC and DOJ

The FTC and DOJ may examine specific aspects of the blockchain, and cryptocurrency industries competition issues could arise. Cryptocurrency exchanges, for instance, could face heightened scrutiny if market power becomes concentrated among a few large players. As exchanges play a crucial role in consumer access to digital assets, conduct in this space that restricts user choice or innovation could draw the interest of antitrust regulators. The infrastructure of blockchain itself may also attract attention if

key participants dominate specific layers, such as blockchain-as-a-service providers or protocol development, creating potential bottlenecks or barriers for new entrants.

Additionally, decentralized finance (DeFi) platforms may present unique competitive risks. Although DeFi protocols are designed to operate autonomously, control can sometimes be concentrated among early investors or governance token holders, creating an environment where competition among platforms could be subtly constrained. The FTC may scrutinize these governance structures, especially whether cross-ownership across platforms may reduce competition for fees.

Potential Consolidation in Blockchain and Cryptocurrency

Another factor the FTC and DOJ may consider is the industry's projected consolidation. Many analysts predict that mergers and acquisitions in blockchain and cryptocurrency will accelerate in the coming months as the industry grows and matures under President Trump. This consolidation trend could be fueled by both increased investment and the competitive pressure to scale up, particularly as larger tech firms expand into blockchain. As larger companies absorb smaller, innovative firms, antitrust authorities may play a critical role in examining these deals to preserve competitive dynamics within the sector.

Consolidation could raise competition concerns, especially if major players accumulate outsized influence over critical segments, such as transaction processing, asset custody, or digital identity. The FTC and DOJ may closely evaluate the impact of mergers on both consumers and smaller competitors, balancing the need for scalability with the preservation of market competition.

Competition Issues for Decentralized Versus Centralized Organizations

Finally, it is worth noting that competition issues may manifest differently for decentralized, open protocols compared to traditional corporations. While traditional corporations are typically controlled by centralized leadership structures, decentralized protocols are often governed by distributed communities, with

decisions made collectively by token holders or participants. This can complicate antitrust evaluations, as decentralized governance may lessen the risk of monopolistic behavior. However, consolidation of governance power—such as when a few entities hold significant influence over protocol decisions—could still lead to antitrust concerns.

Decentralized entities also pose unique regulatory challenges, as their governance models and open-source nature can blur traditional boundaries of ownership and control. Additionally, some networks may employ self-regulation mechanisms that could limit competition and raise antitrust questions. If such entities coordinate or restrict market access in ways that resemble traditional anticompetitive practices, the FTC and DOJ might need to explore new frameworks for assessing competitive harm in decentralized ecosystems.

Overall, the blockchain and cryptocurrency industries are poised to experience significant growth under President Trump's second administration, and the antitrust agencies may play a key role in preserving competition within that rapidly evolving sector.

Notes

* Evan Miller is a partner in the Washington, D.C., office of Vinson & Elkins LLP, focusing his practice on antitrust matters. He may be contacted at emiller@velaw.com.

1. https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-thirteenth-annual-conference.

2. https://www.ftc.gov/news-events/blogs/techftc/2018/03/its-time-ftc-blockchain-working-group.

3. https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/.

Health and Human Services Issues Final Rule on Research Misconduct

Frederick R. Ball, Erin M. Duffy, Coleen W. Hill, and Victoria Hawekotte*

The authors of this article discuss the Department of Health and Human Services' Office of Research Integrity's final rule on research misconduct policies for Division of Public Health Services funding recipients.

The Department of Health and Human Services' (HHS) Office of Research Integrity (ORI) recently issued a final rule[1] on research misconduct policies for Division of Public Health Services (PHS) funding recipients, updating a regulatory regime that has existed since 2005.

ORI's updates are a response to public concerns about research integrity and questions about the misconduct review process. The Final Rule will apply to institutions that applied for or received PHS support for behavioral, biomedical, or intramural research.

Research Misconduct Rule

Definitions

Research misconduct is defined under the Rule as "fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results." The definition explicitly excludes honest error or differences of opinion.

The Rule states that research misconduct will be found where conduct is a "significant departure" from accepted practices in the relevant research community, intentionally, knowingly, or recklessly committed, and proven by a preponderance of the evidence. The Rule includes definitions of "intentionally," "knowingly," and "recklessly" for institution reference. Notably, ORI revised its proposed definition of recklessly to make clear that the definition is

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in reference to reckless research proposal, performance, review, or reporting results, in particular.

The Process

The research misconduct process begins with an institutional assessment of whether an allegation warrants an inquiry. An inquiry is a more formal fact-finding process, including written notice to a respondent and followed by an investigation to determine whether to find research misconduct. Following an institution's final misconduct determination, the respondent or individual accused of research misconduct may initiate an appeal.

Limitation Period

The regulatory regime traditionally has included a six-year limitation on reporting to HHS viable research misconduct allegations from the time of its occurrence. ORI clarifies in its Final Rule that the subsequent use exception to the six-year limitation applies when the respondent "continues or renews any incident" of the alleged misconduct that predates the six-year limitation by republishing or citing to "portions of the research record" (e.g., journal articles, funding proposals) that is alleged to be falsified, plagiarized, fabricated or is used for the respondent's benefit. The Rule requires institutions to document where a case seems to fit into the subsequent use exception, yet the institution finds that it does not. The institution must then retain that documentation.

Assessment Process

The Final Rule requires institutions to promptly initiate an assessment process upon receipt of an allegation. This process should determine whether an allegation warrants beginning a formal inquiry, including whether the allegation is "sufficiently credible and specific." If a research integrity officer or designated official finds that the allegation warrants an inquiry, the individual must document the assessment and sequester research records. If the allegation does not warrant an inquiry, the institution must retain detailed documentation of the assessment process. ORI notes that it may further address this topic through policymaking. The

Rule clarifies that the designated official who makes a final determination regarding research misconduct or institution action must remain separate from the research integrity officer who manages the institution's compliance and structures policies to respond to research misconduct.

Pre-Investigation Timeline

The Rule extends the inquiry or pre-investigation timeline from 60 days to 90 days, with any ongoing inquiry activities after 90 days requiring documentation in the inquiry report. Prior to the investigation phase, ORI directs that within 30 days of determining that an investigation is proper, the institution must provide ORI with an inquiry report. This inquiry report should include interview transcripts. This is significant because a copy of the inquiry report must be given to the respondent as a part of the Rule's notice requirements. While interviewee privacy was a notable concern for those responding to the proposed rule, the Final Rule's policy is that institutions should retain discretion over redacting these interviews.

Confidentiality

The Final Rule further discusses confidentiality in regard to party identities. ORI clarifies that while conducting the research misconduct process, institutions may only disclose witness, respondent or complainant identities to those who "need to know" about potentially inaccurate data, including journals, editors and institutional review boards. The Final Rule added a provision to limit the identity confidentiality timeline to when an institution has made a final determination of research misconduct findings. ORI believes that this will prevent institutions from holding confidential information for an excessive period of time. The confidentiality provision also does not prohibit institutions from managing or acknowledging published data that may be unreliable.

Investigation Period

ORI extended the investigation period, which follows the inquiry period, from 120 to 180 days. ORI noted that this extension

balances the needs of institutions and respondents. ORI also clarified in its Rule that institutions retain the ability to request extensions should they require more time to investigate.

Recordkeeping Provisions

The Rule includes certain recordkeeping provisions. For example, the Final Rule includes a definition of institutional record that excludes documents that an institution compiled or generated during a research misconduct proceeding but did not rely on or consider. However, the record for an institutional appeal should include a description of records sequestered but not relied on or considered. This definition is significant because institutions must transmit the institutional record to ORI after making a final determination of research misconduct findings and will not have to include such documents in that transfer. ORI notes that it will issue guidance on the topic.

Given respondents may appeal to the institution and ORI may initiate its own review, ORI clarified that to ensure institutional appeals do not overlap with any ORI oversight review, institutions should not transmit the institutional record until institutional appeals end. The timing is important because ORI could issue a misconduct finding contrary to the institution's finding. The Final Rule also clarifies that if an institution transmits the institutional record before a respondent files an appeal, the institution must promptly notify ORI.

Effective Date

According to HHS,[2] PHS-funded institutions can expect ORI to release sample policies and guidance to build off the final rule. The Final Rule became effective January 1, 2025; however, the requirements will not be applicable until January 1, 2026.

Notes

* The authors, attorneys at Duane Morris LLP, may be contacted at frball@duanemorris.com, emduffy@duanemorris.com, cwhill@duanemorris.com, and vhawekotte@duanemorris.com, respectively.

1. https://www.federalregister.gov/documents/2024/09/17/2024-20814/public-health-service-policies-on-research-misconduct.

2. https://www.hhs.gov/about/news/2024/09/12/hhs-finalizes-rule-research-misconduct-foster-research-integrity.html.

CFIUS Enforcement Powers Expanded Considerably and Penalty Limits Increased Significantly by New Final Rule

Geoffrey M. Goodale, Joel N. Ephross, Hope P. Krebs, Thomas R. Schmuhl, Elizabeth G. Hodgson, and Raul Rangel Miguel*

In this article, the authors discuss the U.S. Department of the Treasury's final rule that expands the enforcement powers of the Committee on Foreign Investment in the United States and significantly increases the potential financial consequences for noncompliance.

The U.S. Department of the Treasury recently issued a final rule[1] that expands the enforcement powers of the Committee on Foreign Investment in the United States (CFIUS) and significantly increases the potential financial consequences for noncompliance. The final rule, which entered into effect on December 26, 2024, provides CFIUS with enhanced powers to request information, impose penalties, and require timely responses to proposed mitigation terms. For companies engaging in foreign investment transactions, understanding the implications of this final rule is critical to ensuring compliance and mitigating risks.

Background on CFIUS and Its Powers

CFIUS, an interagency committee chaired by the Secretary of Treasury, reviews certain transactions involving foreign investments in U.S. businesses or real estate to assess and mitigate potential national security risks. The jurisdiction of CFIUS was considerably expanded by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) to permit CFIUS to review the following kinds of transactions:

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1. Noncontrolling investments in U.S. businesses involved in critical technologies, critical infrastructure, or sensitive personal data (TID U.S. businesses);
2. Real estate transactions near sensitive U.S. government facilities; and
3. Non-notified transactions, allowing CFIUS to review deals even if the parties do not voluntarily file a notice or declaration.

FIRRMA implementing regulations introduced mandatory filing requirements for certain transactions and established penalties for noncompliance, including failure to file mandatory declarations, breaches of mitigation agreements, and material misstatements or omissions in filings. In April 2024, Treasury issued a proposed rule to expand the authorities of CFIUS.

Key Provisions of the Final Rule

Taking into consideration comments received relating to the April 2024 proposed rule, Treasury issued the final rule to expand authorities for CFIUS and to increase penalty limits for violations.

Broader Scope for Information Requests

CFIUS can now compel not only transaction parties but also unrelated third parties, such as banks, underwriters, or certain service providers to transaction parties, to provide information relevant to determining whether a transaction poses national security risks. This authority extends to non-notified transactions, bolstering the committee's ability to assess deals that may not have been voluntarily disclosed. In determining whether to issue a request for information to a person other than the transaction parties, CFIUS will consider the relationship of the other person to the relevant transaction and the information sought, and will treat information submitted by third parties in accordance with its confidentiality obligations that are enumerated under the CFIUS statute and regulations.

Timelines for Mitigation Responses

To address delays in resolving national security concerns, CFIUS may impose a deadline, with a minimum of three business days, for transaction parties to respond to mitigation proposals. While extensions are possible, this provision underscores the importance of maintaining open communication and preparedness during the review process. It is important to have resources in place to respond quickly to mitigation proposals to avoid potential delays or penalties.

Increased Civil Penalties

The final rule raises the maximum civil penalty for violations of CFIUS regulations or agreements to $5 million per violation. Penalties can also be tied to the value of the transaction or the violator's interest in the U.S. business. This marks a significant increase from the previous $250,000 cap, reflecting the heightened focus on deterrence. Companies should review and strengthen compliance mechanisms to minimize exposure to costly penalties.

Expanded Subpoena Authority

The final rule also expands CFIUS's subpoena authority. In accordance with the final rule, CFIUS may, if appropriate, request and compel through issuance of a subpoena the production of information not only from transaction parties but also from other persons to aid in the enforcement or administration of the CFIUS statute and regulations. When doing so, CFIUS will consider the relationship of the other person to the relevant transaction and the information sought, and CFIUS will treat information submitted by third parties in accordance with confidentiality obligations that are enumerated under the CFIUS statute and regulations. Given CFIUS's expanded subpoena authority, parties to a transaction (and their lenders and advisors) need to account for CFIUS risk even in deals that may not seem to fall within its jurisdiction.

Extended Reconsideration Periods

The final rule extends the time frame for parties to respond to penalty notices and seek reconsideration, providing a more structured process for addressing alleged violations. While this change offers procedural flexibility, the importance of timely and accurate compliance should remain a priority for parties to a transaction.

Conclusion

The final rule issued signals a clear intent for CFIUS to intensify its oversight of foreign investments. Parties involved in cross-border transactions should evaluate whether their transactions could fall under CFIUS jurisdiction, including non-notified deals, build internal compliance frameworks to manage information requests and mitigation proposals effectively, and consider conducting pre-transaction CFIUS risk assessments to identify potential red flags and prepare for potential scrutiny.

Notes

* The authors, attorneys at Duane Morris LLP, may be reached at gmgoodale@duanemorris.com, jnephross@duanemorris.com, hpkrebs@duanemorris.com, trschmuhl@duanemorris.com, ehodgson@duanemorris.com, and rrangel@duanemorris.com, respectively.

1. https://www.federalregister.gov/d/2024-27310.

New H-1B Rule Aims to Modernize H-1B Visa Program

Kerri-Ann Griggs and Eileen Scofield*

The authors of this article break down the many changes U.S. Citizenship and Immigration Services implemented for the H-1B and F-1 visa programs.

The Department of Homeland Security (DHS) published the final rule[1] that implemented changes to the H-1B program. The rule became effective January 17, 2025. The rule aims to modernize the H-1B and F-1 visa programs by clarifying definitions, enhancing program integrity, and providing greater flexibility for employers and beneficiaries. These changes are designed to streamline processes, reduce administrative burdens, and maintain the integrity of the visa programs.

In order to implement this rule, a new edition of Form I-129, Petition for a Nonimmigrant Worker,[2] will be required for all petitions beginning January 17, 2025. Because the new form revisions will require immediate use because of the new rules, DHS will not allow a grace period to allow for older forms to be submitted. This is meant to allow for a smooth implementation of the updated H-1B process and avoid confusion with obsolete information on older forms.

The main provisions of the rule are below.

H-1B Visa Program

"Specialty Occupation" Definition

- Revised to clarify that a position's duties must be directly related to the range of qualifying degree fields.
- Codified the "directly related" requirement, meaning there must be a logical connection between the degree or its equivalent and job duties.[3]
- Removed references to "business administration" and "liberal arts" to recognize that degree title alone is not determinative.[4]

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Program Integrity and Compliance

- Codified the authority to request contracts or similar evidence to verify the bona fide nature of the position.[5]
- Emphasized the requirement for a bona fide job offer, including telework or remote work, at the time of filing.
- Codified site visit authority to ensure compliance, detect fraud, and impose penalties for failure to comply.[6]
- Clarified that the labor condition application must support and properly correspond to the H-1B petition.
- Required that the petitioner have a legal presence and be subject to legal processes in courts in the United States.

Cap Exemptions and Definitions

- Revised the definitions of "nonprofit research organizations" and "governmental research organizations," increasing their eligibility under cap exemptions.
- Replaced "primarily engaged" and "primary mission" terms with "fundamental activity" to encompass organizations that conduct research as a fundamental activity.
- Clarified eligibility for H-1B cap exemptions.

Concurrent Employment and Beneficiary Owners

- Outlined the parameters for concurrent employment with cap-exempt and nonexempt employers.
- Allowed H-1B beneficiaries with a controlling interest in the petitioning organization to be eligible for H-1B status subject to reasonable conditions, including shortened validity periods such as 18 months each for the validity of the initial H-1B petition and first extension.[7]

Filing and Validity Periods

- Clarified when amended or new petitions are required due to changes in employment location.
- Allowed for flexibility in validity periods if adjudication occurs after the initially requested end date.[8]

Elimination of Itinerary Requirement

- Removed the itinerary requirement to reduce duplication and administrative burden.[9]

Third-Party Placement

- Codified practices for assessing third-party placements, ensuring positions qualify as specialty occupations.

Deference to Previous Approvals

- Codified USCIS policy for adjudicators to defer to a prior USCIS eligibility determination when the petition involves the same parties and same underlying facts.
- Provided an exception to such deference if a material error in the prior approval is discovered or other material change or information impacts eligibility.[10]

F-1 Visa Program

Cap-Gap Extension

- Extended the automatic cap-gap extension to April 1, providing more flexibility and preventing disruptions in employment authorization and lawful status for F-1 students transitioning to H-1B status.[11]

Notes

* Kerri-Ann Griggs is a partner at Alston & Bird LLP. Eileen Scofield is a counsel at the firm. The authors may be contacted at kerri.griggs@alston.com and eileen.scofield@alston.com, respectively.

1. https://www.federalregister.gov/public-inspection/2024-29354/modernizing-h-1b-requirements-providing-flexibility-in-the-f-1-program-and-program-improvements.
2. https://www.uscis.gov/i-129.
3. See new 8 CFR 214.2(h)(4)(ii).
4. See new 8 CFR 214.2(h)(4)(ii) and (h)(4)(iii)(A).

5. See new 8 CFR 214.2(h)(4)(iv)(C).
6. See new 8 CFR 214.2(h)(4)(i)(B)(2).
7. See new 8 CFR 214.2(h)(9)(iii)(E).
8. See new 8 CFR 214.2(h)(9)(ii)(D).
9. See new 8 CFR 214.2(h)(2)(i)(B) and (F).
10. See new 8 CFR 214.1(c)(5).
11. See new 8 CFR 214.2(f)(5)(vi)(A).

SEC’s Settlement with Keurig Portends Expanded ESG Liability

Robert Stern, Lyuba Goltser, Rebecca Grapsas, and Ben Marcu*

The Securities and Exchange Commission charged Keurig with violations of the Securities Exchange Act of 1934 in connection with its filing of allegedly incomplete and inaccurate annual reports regarding the recyclability of its K-Cup single-use beverage pods. To settle the charges, Keurig agreed to pay a $1.5 million civil penalty and accept a cease and desist order, without admitting or denying the Commission’s findings. The authors of this article discuss the settlement and its implications.

The Securities and Exchange Commission (SEC or Commission) charged Keurig Dr Pepper Inc. with making inaccurate statements regarding the recyclability of its K-Cup single-use beverage pods. To settle the SEC’s charges, Keurig agreed to pay a $1.5 million civil penalty and accept a cease and desist order, without admitting or denying the SEC’s findings.

More specifically, the SEC charged Keurig with violations of Section 13(a) of the Securities Exchange Act of 1934 and Rule 13a-1 promulgated thereunder in connection with its filing of allegedly incomplete and inaccurate annual reports. The violation centers around Keurig’s environmental, social, and governance (ESG) related disclosures in its 2019 and 2020 annual reports, in which Keurig represented that its “K-Cup” coffee pods could be “effectively recycled.” The Order alleges that at the times Keurig made those disclosures, it was aware that at least two large recycling companies, operating more than a third of national recycling facilities, would not accept the pods for recycling at their facilities.

The Order

In the Order,[1] the SEC alleges that based on market research Keurig conducted in 2016, Keurig determined that, for certain of its customers, environmental concerns were a significant factor in

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their decision to purchase Keurig brewing systems. Keurig then updated its K-Cup pod manufacturing in an effort to make the pods recyclable by the end of 2020, to achieve a goal that was included in a 2014 Sustainability Report of Keurig Green Mountain, Inc., now a subsidiary of Keurig. Keurig allegedly ran tests on the pods and solicited feedback from recycling companies to determine if the newly designed pods could be successfully sorted from other materials at recycling facilities. The tests showed that the pods could be successfully sorted, but the Order alleges that two large recycling companies, accounting for more than a third of national recycling facilities, informed Keurig that they would not recycle the pods, a fact for which Keurig did not include a related risk factor.

In its 2019 fiscal year Annual Report on Form 10-K, Keurig disclosed, under the sub-heading "Sustainable Packaging" in the Corporate Responsibility section of the annual report, that it was on track to meet its goal of making "all K-Cup pods sold in the U.S. recyclable by the end of 2020" and also that it had "conducted extensive testing with municipal recycling facilities to validate that [the pods] can be effectively recycled" because they are made of "polypropylene #5 plastic, a material that is accepted curbside for recycling by many communities."[2] Keurig did not disclose that the two recycling companies would not accept the pods.

In its 2020 fiscal year Annual Report on Form 10-K, Keurig repeated the prior year's disclosure about the recyclability of the pods and stated that, in December 2020, it had achieved its goal of making all K-Cup pods sold in the U.S. recyclable. The filing added that it "continue[s] to engage with municipalities and recycling facilities to advance the quantity and quality of recycled polypropylene and ha[s] committed $10 million toward the advancement of polypropylene recycling in the U.S. through the Polypropylene Recycling Coalition, an effort led by The Recycling Partnership and funded by leading brands, recyclers, converters and producers of polypropylene."[3] Keurig did not disclose that the two recycling companies would not accept the pods. But in both annual reports, Keurig noted that its solutions for reuse and recycling "require[] collaboration of all parties along the value chain" and that it was using its partnerships, including with "industry groups, non-governmental organizations and investment firms, to move our commitments beyond independent ambitions to collective action."[4] This latter disclosure was not discussed in the Order.

Keurig's subsequent Annual Reports on Form 10-K, starting with the Form 10-K for the year ended December 31, 2021, did not contain any discussion of its recyclability goals or testing.

The Order asserts that the statements in Keurig's 2019 and 2020 fiscal year Annual Reports on Form 10-K were incomplete and inaccurate because they did not also disclose the negative feedback received from recycling companies involved in the testing concerning the recyclability of pods, and therefore violated Exchange Act Section 13(a) and Rule 13a-1 thereunder. It does not directly allege fraud or even negligence—just incompleteness for Keurig's failure to include disclosure describing the negative feedback received from the two recycling companies involved in the pod recyclability testing.

Implications

The Order comes on the back of a 2022 federal consumer class action settlement in which Keurig agreed to pay $10 million to consumers who purchased Keurig products that touted the recyclability of the K-Cup pods.[5]

Despite the relatively modest $1.5 million civil penalty, the mechanism for the settlement signals the SEC's willingness to allege violations of the securities laws based on the Exchange Act's strict liability provisions that regulate issuers' annual reports. The use of strict liability provisions by the Commission continues a recent trend, including charges relating to deficient disclosure of related person transactions and insider transactions. The imposition of virtual strict liability against issuers for misstatements or omissions concerning sustainability in a Form 10-K represents an aggressive step in ESG enforcement. Unlike Section 10(b) of the Exchange Act or Section 17(a) of the Securities Act, Section 13(a),[6] which provides the basis for the violation and settlement here, does not require evidence of scienter or negligence but still affords the Commission much of the same relief. And although the Commission has brought cases like this one against financial institutions and other highly regulated entities for some time, it is highly unusual for a case like this to be brought against a consumer retail company.

This action is also the most recent example of the Division of Enforcement taking an extremely broad view of materiality in an area where the Commission has previously expressed a policy

interest. More specifically, the Order finds that Keurig's material omission is that it failed to disclose negative feedback from two recycling companies regarding the commercial feasibility of curbside recycling of its K-Cup pods. Perhaps unsurprisingly, Commissioner Hester Peirce took issue with the materiality standard imposed here, noting in dissent that "[t]he disclosure standard embodied in this settlement may have the positive effect of dissuading companies from talking about immaterial items in the SEC filings, but it will also expose companies to endless second-guessing by the Commission unless they pad any statements . . . with a mountain of caveats." *Keurig*, thus, raises the possibility that even those issuers who act diligently, but inadvertently file SEC annual or quarterly reports that contain a misstatement or omission concerning sustainability, could find themselves subject to an SEC enforcement action. The standard imposed by Keurig would represent a significant expansion of SEC liability and create significant new ESG exposure for public company issuers that have included ESG-related disclosure, including targets and goals, in annual or quarterly reports filed with the SEC. Although Commissioner Peirce was a dissenting voice in Gary Gensler's SEC under the Biden administration, we expect that the SEC under the Trump administration is likely to be less aggressive in pursuing actions for Keurig-like misconduct, particularly under the stewardship of President Trump's nominee for SEC Chair, Paul Atkins, who is expected to prioritize the advancement of companies' business prerogatives at the expense of ESG considerations.

However, State Attorneys General, the Federal Trade Commission, and private plaintiffs are also focused on and bringing claims based on communications outside of SEC filings, such as ESG reports, corporate websites, and marketing materials.

Companies remain advised to:

- Conduct periodic "health checks" or reviews of all sustainability and ESG-related disclosures, marketing claims, and public statements, to identify risks of greenwashing accusations.
- Ensure risk factors, forward-looking statements, and other disclaimers are current and protective, and other litigation and enforcement risk mitigation strategies implemented.
- Review disclosure controls and procedures to ensure that ESG-related disclosures are appropriately covered, and review effectiveness of related internal controls.

- When updating or changing sustainability or ESG targets consider whether an explanation of such change is advisable.

Notes

* The authors, attorneys at Weil, Gotshal & Manges LLP, may be reached at robert.stern@weil.com, lyuba.goltser@weil.com, rebecca.grapsas@weil.com, and ben.marcu@weil.com, respectively.

1. https://www.sec.gov/files/litigation/admin/2024/34-100983.pdf.
2. Keurig 2019 10-K at 7, filed Feb. 27, 2020.
3. Keurig 2020 10-K at 9, filed Feb. 25, 2021.
4. Id.
5. See Smith v. Keurig Green Mountain, Inc., 4:18-CV-06690-HSG (N.D. Cal.).
6. Section 13(a) is focused on the conduct of the issuer. While Section 13(a) violations are strict liability for the issuer, the SEC can only pursue secondary liability theories against individuals or other experts that contributed to the relevant annual reports for either aiding and abetting or causing the issuer's violation. Aiding and abetting a Section 13(a) violation requires the SEC to establish actual knowledge or recklessness, while causing such a violation requires the SEC to establish negligence.