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Regulatory/ Administrative Tracker

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Table of Contents

Table of Contents

February 13, 2025

Trump EO Pauses FCPA Enforcement After DOJ Day-One Directives Announce Significant Shift in Priorities, Including the Reorientation of FCPA, FARA and Money Laundering Enforcement

On February 5, 2025, Attorney General Pamela Bondi issued 14 directives intended to align the U.S. Department of Justice (DOJ) with President Trump's stated policies and to lay the foundation for the DOJ to execute those policies under her leadership. These directives, issued in the form of memos to all DOJ employees, cover a wide range of topics and, among other things, establish a Weaponization Working Group to review law enforcement actions taken under the Biden administration for any examples of politicized actions; create a task force focused on Hamas' October 7, 2023 attack in Israel; and lift the moratorium on the federal death penalty.

The directives also announced new enforcement policies and priorities, including a reorientation of several long-standing areas of DOJ focus: foreign corruption, money laundering, asset forfeiture and certain national security offenses. The memos direct the nation's federal prosecutors to shift their attention to the total elimination of cartels and transnational criminal organizations (TCOs).[1] The memos also disband several kleptocracy and national security initiatives, including the Biden DOJ's primary task force on criminal enforcement of the sanctions against Russia following its 2022 Ukraine invasion, though they do not impact ongoing sanctions enforcement by the US Department of the Treasury's Office of Foreign Assets Control (OFAC), including the Russia sanctions regime.

Within days of the DOJ issuing its directives, on February 10, 2025, the White House issued its Executive Order Pausing FCPA Enforcement to Further American Economic and National Security requiring a 180-day pause on all new Foreign Corrupt Practices Act ("FCPA") investigations or enforcement actions, as well as a review of all existing FCPA matters. During the pause, which can be extended for an additional 180 days, the Attorney General is required to issue FCPA enforcement guidelines for

[1] *See* Paul, Weiss, Rifkind, Wharton & Garrison LLP, *President Trump Issues Executive Order Signaling a Push to Designate Drug Cartels as Foreign Terrorist Organizations* (Feb. 3, 2025), https://www.paulweiss.com/practices/litigation/economic-sanctions-aml/publications/president-trump-issues-executive-order-signaling-a-push-to-designate-drug-cartels-as-foreign-terrorist-organizations?id=56400.

future cases, all of which must be approved by the Attorney General. The Order also calls for a retrospective review of prior FCPA investigations and enforcement actions.

In light of these important shifts in DOJ policies and priorities, companies should assess their business operations and reevaluate their existing compliance programs to ensure that they properly mitigate risks associated with any known or unknown involvement with cartels and TCOs. Companies involved in agriculture, manufacturing, mining, logistics, oil and supply chains may be at higher risk under the new regime, to the extent that their products are sourced from or moved through, or their facilities are located in, regions with heightened cartel and TCO activity. Likewise, financial institutions dealing with transactions involving entities located in higher-risk regions may face additional scrutiny.

Two of these recent memos, titled "General Policy Regarding Charging, Plea Negotiations, and Sentencing" (AG Charging Memo) and "Total Elimination of Cartels and TCOs Memorandum" (AG Cartel Memo), enact some of the most significant changes in the Trump Administration's approach and are expected to have a substantial impact on criminal enforcement.

Foreign Corruption

The Executive Order directs the Attorney General to cease for 180 days the "initiation of any new FCPA investigations or enforcement actions, unless the Attorney General determines that an individual exception should be made," as well as to "review in detail all existing FCPA investigations or enforcement actions." During the pause, the Attorney General must develop updated guidelines that ensure "American economic competitiveness with respect to other nations" to govern all FCPA investigations and enforcement actions, and any future FCPA matters must "be specifically authorized by the Attorney General." The Order also instructs the Attorney General to consider whether any remedial measures are needed for any "inappropriate past FCPA investigations and enforcement actions." The Order omits details on the implementation of its mandates, including how far back in time the case review should extend, what qualifies as "inappropriate," and the range of permissible remedies.

The Executive Order expresses the view that prohibitions on bribery undermine the competitiveness of U.S. companies abroad. As explained in the "Fact Sheet" accompanying the Order: "U.S. companies are harmed by FCPA overenforcement because they are prohibited from engaging in practices common among international competitors, creating an uneven playing field."[2] Both the Order and Fact Sheet also state that the FCPA undermines "American national security" because it thwarts companies from gaining "strategic business advantages" aboard.[3]

The AG Cartel Memo directs the DOJ Criminal Division's FCPA Unit to prioritize investigations and prosecutions of bribery of foreign public officials that facilitate the criminal operations of cartels and TCOs, such as bribery of foreign officials to enable human smuggling and the trafficking of narcotics and firearms. Prosecutors are instructed to shift focus away from investigations and cases that do not involve such a connection, which could impact the number of investigations and prosecutions by the FCPA Unit. Factors that may mitigate any impact include that some companies will continue to self-disclose; the SEC and DOJ whistleblower hotlines will continue to receive FCPA tips; foreign authorities will continue to refer allegations; and, as discussed immediately below, a broader set of federal prosecutors will be freed to pursue cartel/TCO-related FCPA cases with less involvement of the FCPA Unit.

[2] White House, "Fact Sheet: President Donald J. Trump Restores American Competitiveness and Security in FCPA Enforcement" (Feb. 10, 2025), https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-restores-american-competitiveness-and-security-in-fcpa-enforcement/

[3] Although not discussed in the Executive Order, the FCPA has a specific provision that addresses US national security, which states: "With respect to matters concerning the national security of the United States, no duty or liability under [the books and records and internal controls provisions] shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives." 15 U.S. Code § 78m(b)(3)(A).

Although the DOJ has previously brought corruption-related cases tied to TCO activity—such as the 2020 drug- and firearm-related charges brought against former president of Venezuela, Nicolás Maduro Moros, and several other Venezuelan leaders, and the 2023 drug-related conviction against former Mexican Secretary of Public Security, Genaro García Luna—there is limited history of FCPA charges directly tied to this type of activity. One example is the prosecution of Ukrainian businessman Dmitry Firtash, a pending case dating back to 2013 which accuses Firtash of leading a "criminal enterprise" that "brib[ed] Indian public officials" to secure mining rights in India.[4]

In addition, with respect to cartel/TCO-related matters, the memo suspends prior internal DOJ policies (found in the Justice Manual) that required the Criminal Division to authorize an investigation or prosecution of a case under the FCPA or the Foreign Extortion Prevention Act (FEPA), as well as the requirement that such cases be conducted by trial attorneys of the Fraud Section. As a result, U.S. Attorney's Offices will now have more discretion and flexibility to pursue FCPA and FEPA cases that have a link to cartels or TCOs, and those cases may be pursued with less involvement by the Criminal Division.

Neither the AG Cartel Memo nor the other DOJ memos affect the sanctions work of the US Department of the Treasury's Office of Foreign Assets Control, which will continue to administer and enforce economic and trade sanctions, or the US Department of State's Office of Economic Sanctions Policy and Implementation, which will continue to develop and implement foreign policy-related sanctions.

Money Laundering and Asset Forfeiture

The AG Cartel Memo also requires the DOJ Criminal Division's Money Laundering and Asset Recovery Section (MLARS) to prioritize investigations, prosecutions and asset forfeiture actions that target the activities of cartels and TCOs. Although the memo does not provide examples, it appears that such cartel activities could involve the laundering of illicit proceeds, the financing of criminal operations and the acquisition of assets derived from or used for criminal purposes.

National Security

The AG Charging Memo establishes new enforcement and resource priorities for the National Security Division (NSD). Most notably, the memo requires prosecutors to limit the use of criminal charges under the Foreign Agents Registration Act (FARA) and 18 U.S.C. § 951, which generally prohibit acting as an agent of a foreign principal without proper registration or notification, to instances of "alleged conduct similar to more traditional espionage by foreign government actors." The memo also calls on NSD's Counterintelligence and Export Control Section, including the FARA Unit, to focus on civil enforcement, regulatory initiatives and public guidance with respect to FARA and § 951, rather than pursuing criminal charges. The memo does not address the prior administration's DOJ December 19, 2024 Notice of Proposed Rulemaking (NPRM) related to FARA. That proposed rule would narrow the FARA exemption for commercial activities and make other updates that would expand the scope of activities and entities subject to FARA's registration requirements.

The memo also disbands: (1) NSD's Corporate Enforcement Unit, a recent initiative from the last administration that focused on corporate enforcement in export controls, sanctions and other national security cases; and (2) the Foreign Influence Task Force, which was established in 2017 to combat covert foreign influence operations in the United States. As previously noted, none of these AG Memos impacts the sanctions enforcement work of OFAC, and DOJ prosecutors can still pursue charges against operators of foreign influence campaigns outside the framework of the task force.

The AG Charging Memo's likely impact on NSD's corporate white collar focus is unclear. At least with respect to FARA enforcement, the NSD had already narrowed the scope of such enforcement after a series of court rulings had limited the scope of FARA and the memo is clear that the new administration intends to forgo criminal prosecution except in instances that bear the hallmarks of traditional espionage.

[4] *See* Indictment, *United States* v. *Firtash*, No. 13-CR-515 (N.D. Ill.), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/04/03/df_indictment_final_stamped_6-20-13.pdf.

Charging and Sentencing Policies

The AG Charging Memo contains extensive guidance for prosecutors to consider in charging, plea negotiations and sentencing decisions. Notably, the memo repeatedly emphasizes the need to avoid making such decisions based on political views or affiliations. For example, the memo emphasizes that charging decisions may not be influenced in any respect by a subject's political association, activities, or beliefs. Similarly, the memo states that "[t]here is no room in plea bargaining for political animus or other hostility."

Other New Policies and Guidance

In addition to the memos described above, the DOJ has published two memos addressing (a) the use of sub-regulatory guidance—guidance that did not go through notice-and-comment rulemaking—in enforcement actions and (b) the advocacy required to implement the current Administration's priorities:

- **Reinstating the "Prohibition on Improper Guidance Documents"**: This memo reinstates two memos that were issued in the first Trump Administration but later rescinded by the Biden Administration, the "Prohibition on Improper Guidance Documents" and the "Memorandum from the Associate Attorney General, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases." These reinstated memos prohibit the use of sub-regulatory guidance to create rights or binding obligations on regulated entities and restrict prosecutors from bringing affirmative enforcement actions based on sub-regulatory guidance.

- **General Policy Regarding Zealous Advocacy on Behalf of the United States**: This memo mandates that DOJ attorneys zealously advocate for the United States, which is defined to include "not only aggressively enforcing criminal and civil laws" but also "vigorously defending presidential policies and actions against legal challenges[.]" Should a DOJ attorney decline to sign a brief or appear in court, refuse to advance good-faith arguments on behalf of the Administration, or otherwise delay or impede the Department's mission because of his or her political views, the memo provides that the attorney will be subject to discipline and potentially termination.

Key Takeaways

These developments reflect a reorientation of the DOJ's enforcement priorities, which are expected to have an impact on the nature and volume of enforcement actions traditionally brought by the Criminal Division's FCPA Unit and MLARS, the National Security Division and possibly other components. There are also factors mitigating against any dramatic change in enforcement activity. We will continue to monitor developments in these areas, including the rollout of DOJ's new FCPA enforcement guidelines following the enforcement pause, the review of present and past FCPA enforcement actions, and whether the provisional DOJ directives are ultimately adopted as-is or amended,[5] and report on enforcement activity and other developments including in our various Year in Review publications.[6]

Regardless of whether the Executive Order and the new directives have a long-term impact on enforcement activity in these areas, they do contain important pronouncements. Companies should consider the following potential implications of these new policies:

- Companies should take a close look at their compliance programs, including their know-your-customer and third-party risk management practices, to ensure that they are addressing cartel and TCO risks. Counterparty risk management processes, including due diligence, engagement and monitoring practices may need to be adjusted to account for these risks. Some

[5] The AG Cartel Memo provides that "the changes set forth below will be implemented for a period of 90 days and renewed or made permanent thereafter as deemed appropriate by the Office of the Attorney General and the Office of the Deputy Attorney General."

[6] *See* Paul, Weiss, Rifkind, Wharton & Garrison LLP, 2024 Year in Review: FCPA Enforcement and Anti-Corruption Developments; 2024 Year in Review: Economic Sanctions and Anti-Money Laundering Developments; 2024 Year in Review: CFIUS, Outbound Investments and Export Controls.

cartels and TCOs, along with their leadership, already appear on sanctions lists maintained by OFAC, which will be helpful for companies that already incorporate sanctions screening in their compliance programs.

- These latest shifts in enforcement priorities are not a safeguard against investigation or prosecution for corruption or money laundering-related offenses. As a result, companies are cautioned against any de-investment in compliance programs or related controls in light of these latest developments.
  - The statute of limitations for most federal crimes is five years (six years for certain FCPA offenses, ten years for bank fraud), meaning relevant offenses that occurred in the recent past or during the current administration could be prosecuted by a subsequent administration. Moreover, prosecutors in the early stages of investigations frequently request—and receive—tolling agreements, or obtain court tolling orders based on requests for foreign evidence, which allow the DOJ (as well as the SEC) to bring enforcement actions for conduct that occurred much earlier in time.
  - While temporarily frozen, FCPA investigations that were in motion prior to February 10th—some known to the subjects of the investigation, and some unknown—may ultimately proceed on track following the Attorney General's review of those cases, regardless of whether they have a cartel/TCO nexus.
  - The DOJ's shift in priorities does not extend to other federal regulators, including the SEC, which has its own FCPA Unit to investigate and prosecute violations of the FCPA's anti-bribery and internal accounting provisions involving issuers, and the Commodity Futures Trading Commission, which has brought several foreign bribery actions under the Commodities Exchange Act. The Executive Order's discussion of the foreign affairs, economic and national security prerogative of the President, however, suggest that civil enforcement actions by the SEC or other federal regulators may also be impacted.
  - Various state authorities, especially State Attorneys General from Democratic states, may seek to fill the enforcement void and, to the extent there is state legislation and a sufficient jurisdictional hook, investigate companies for misconduct that has traditionally been the province of federal regulators. We may also see an uptick in transnational bribery cases from select local prosecutors such as the Manhattan District Attorney's Office, which has a history of pursing complex, cross-border financial crime, and may similarly shift more attention to foreign bribery.
  - The DOJ's directives may draw resources from enforcement areas not directly tied to cartel or TCO activity. For example, the shift in priorities could reallocate the DOJ's FCPA-focused resources, which, in contrast to the DOJ's Narcotics-, MLARS- and Violent Crime and Racketeering Section-focused resources, historically have not been used to target cartel and TCO-related activity. Similarly, DOJ enforcements efforts related to kleptocracy, sanctions and money laundering that do not involve cartels or TCOs may be less of an emphasis in the new administration. However, as we have noted, even if there is some resource reduction, that may be counterbalanced by other circumstances and developments which could help DOJ maintain its impact in these enforcement areas.
- Finally, companies should not assume that the DOJ will drop existing investigations following its review, nor should they assume that significant conduct not falling clearly within the newly-articulated priorities will not be investigated.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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UPDATED JANUARY 29, 2025 – Paul, Weiss Regulatory/Administrative Tracker

President Trump’s Initial Executive Orders Signal Significant Regulatory and Policy Changes

Paul, Weiss Launches Initiative to Monitor Key Developments

Introduction

In his first weeks in office, President Trump issued a series of executive orders and presidential memoranda that aim swiftly to effectuate his Administration’s key policy and regulatory objectives across a number of areas and industries.

Paul, Weiss is launching an initiative to monitor these key developments. Paul, Weiss attorneys have served in cabinet-level and other senior positions across the last five administrations. This memorandum, which will be continually updated, provides a summary of key developments from this first week relating to cross-border M&A and national security, technology, energy and the environment, healthcare and pharmaceuticals, regulatory administration, DEI programs and employment, and immigration and border security. Paul, Weiss will provide updates to assist boards and management in navigating the rapidly changing regulatory and policy environment.

Cross-Border M&A and National Security

In his first weeks, President Trump issued a series of executive orders and presidential memoranda that affect cross-border M&A, international tax regimes, and the legal exposure of U.S. and non-U.S. companies operating across the globe.

America First Trade Policy

On January 20, 2025, President Trump issued a presidential memorandum entitled *America First Trade Policy* to members of his economic Cabinet, directing them to take a variety of measures “establishing a robust and reinvigorated trade policy.”[1] This memorandum outlines a set of policy priorities that are likely to be the focus of President Trump’s trade agenda during his second term.

Tariffs: Among other actions, the memorandum directs an investigation “of our country’s large and persistent annual trade deficits in goods, as well as the economic and national security implications and risks resulting from such deficits, and recommends appropriate measures, such as a global supplemental tariff or other policies, to remedy such deficits.” The memorandum directs agencies to “investigate the feasibility of establishing and recommend the best methods for designing, building, and implementing an External Revenue Service (ERS)” to collect foreign-trade-related revenues.

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1 Presidential Memorandum, *America First Trade Policy* (January 20, 2025), available here.

Unfair Trade Practices: The memorandum has a particular focus on "any unfair trade practices by other countries," including "the impact of the USMCA [the United States-Mexico-Canada Agreement] on American workers, farmers, ranchers, service providers, and other businesses," and a directive to "review and assess the policies and practices of major United States trading partners with respect to the rate of exchange between their currencies." There are currently seven economies on Treasury's monitoring list for currency manipulation: China, Japan, Korea, Singapore, Taiwan, Vietnam, and Germany.

People's Republic of China: The memorandum has a particular emphasis on the trade relationship between the United States and China. It directs a number of reviews relating to the U.S.-China relationship, including:

- *Outbound Investment*: A review led by the Secretary of the Treasury of the recent outbound-investment final rule, to determine whether it "includes sufficient controls to address national security threats." The memorandum states that "The Secretary of the Treasury shall make recommendations based upon the findings of this review, including potential modifications to the Outbound Investment Security Program."

- *301 Tariff Review*: A review by the United States Trade Representative of existing Section 301 actions against China and a directive to "consider potential additional tariff modifications" with a focus on "industrial supply chains."

- *Trade Review:* A review by the United States Trade Representative of the Economic and Trade Agreement between the U.S. and China and any "other acts, policies, and practices by the PRC that may be unreasonable or discriminatory and that may burden or restrict United States commerce."

- *Export Controls*: A review by the Secretary of State and the Secretary of Commerce to "identify and eliminate loopholes in existing export controls."

- *Industrial Policy Review*: A "full economic and security review" by the Secretary of Defense "of the United States' industrial and manufacturing base to assess whether it is necessary to initiate investigations to adjust imports that threaten the national security of the United States," including a specific directive to review steel and aluminum tariffs.

- *Connected Vehicles*: A directive to the Secretary of Commerce to review the "rulemaking by the Office of Information and Communication Technology and Services (ICTS) on connected vehicles" and "consider whether controls on ICTS transactions should be expanded to account for additional connected products."

Key Takeaways: The impacts of the memorandum will become clearer as agencies begin to report back on the directives contained within it, but key takeaways for businesses include:

- *Increased Tariffs*: This memorandum set forth the prospect of increased tariffs. It remains to be seen whether those tariffs will be levied on regional neighbors (e.g., Canada and Mexico) as a tool for advancing other strategic goals, such as border security or combating the drug trade, on key national security sectors, or against competitors like China.

- *U.S.-China Economic Relations*: Companies with greater exposure to China face significant risks from potential new tariffs, effects on the yuan if China is redesignated a currency manipulator, potential new export controls, outbound investment controls, and the downstream effects of any rulemaking on connected products.

Global Tax Deal

On January 20, 2025, President Trump also signed a separate presidential memorandum directing the Secretary of the Treasury and the Permanent Representative of the United States to the Organization for Economic Cooperation and Development (OECD) to "notify the OECD that any commitments made by the prior administration on behalf of the United States with respect to the

Global Tax Deal have no force or effect within the United States absent an act by the Congress adopting the relevant provisions of the Global Tax Deal."[2]

The global minimum tax agreement (referred to as "Pillar Two" of the Global Anti-Base Erosion Model Rules) establishes a 15% minimum global corporate tax rate and encourages countries to impose certain tax penalties on businesses that are taxed in jurisdictions that have not complied with Pillar Two. Although the corporate tax rate in the United States exceeds the Pillar Two minimum, the calculation of the tax base in the U.S. is not aligned with the OECD and thus there is the risk foreign countries may subject U.S. companies to higher taxes. To deter those measures, the memorandum directs the Secretary of the Treasury and the United States Trade Representative to "investigate whether any foreign countries are not in compliance with any tax treaty with the United States or have any tax rules in place, or are likely to put tax rules in place, that are extraterritorial or disproportionately affect American companies," and to report on its findings and potential responses within 60 days.

Key Takeaways: At this juncture, the key takeaways for businesses are uncertain:

- *Potential Tax Consequences*: The tax consequences for businesses are unclear, as it is uncertain what tax measures foreign countries will take in response to this action and whether they will be deterred by the threat of U.S. tax retaliation.

- *Potential Congressional Tax Action*: The memorandum leaves open the possibility that Congress (which has yet to enact the Global Tax Deal) may take some action to comply with the tax deal. Paul, Weiss will continue closely to monitor developments in this space, including any potentially relevant tax provisions in a budget reconciliation bill being developed by Congress.

Designating Cartels as Foreign Terrorist Organizations

President Trump issued an executive order directing members of his cabinet to provide recommendations on "designating cartels and other organizations as foreign terrorist organizations and specially designated global terrorists."[3] The Foreign Terrorist Organization ("FTO") designation has traditionally been applied to terrorist organizations, like Al-Qaeda, Boko Haram, Hezbollah, and the Islamic State. While the Department of the Treasury's Office of Foreign Assets Control ("OFAC") has designated certain cartels as FTOs, the FTO designation could carry heightened civil and criminal risks for U.S. and foreign businesses and their executives that operate in areas where the designated cartels operate.

Key Takeaways: At this time, we do not know which cartels may be designated, if any. Key takeaways for businesses to consider are:

- *Refreshing Risk Assessments*: In the event of additional designations, U.S. and non-U.S. companies whose business operations may come into contact with FTOs should consider conducting or refreshing a risk assessment to identify potential areas of interaction with cartels, and associated individuals and businesses.

- *Further Due Diligence*: Companies should consider reviewing their due diligence policies and procedures to ensure that they are well-designed to detect higher risk activities that may involve FTOs. Financial-services firms should consider a risk-based approach to any designations and apply appropriate diligence in business sectors in which the designated cartels operate.

"Iron Dome for America" Missile Defense System

2 Presidential Memorandum, *The Organization for Economic Co-operation and Development (OECD) Global Tax Deal (Global Tax Deal)* (January 20, 2025), available here.

3 Executive Order, *Designating Cartels And Other Organizations As Foreign Terrorist Organizations And Specially Designated Global Terrorists* (January 20, 2025), available here.

On January 27, 2025, President Trump issued an executive order titled "The Iron Dome for America," directing the Secretary of Defense to submit within 60 days an implementation plan for a "next-generation missile defense shield" and a plan, with the Director of the Office of Management and Budget, for funding that shield. [4] The Secretary of Defense is also directed to review existing "theater missile defense posture and initiatives" and identify ways to, among other things, "improve theater missile defenses of forward-deployed United States troops" and "increase and accelerate the provision of United States missile defense capabilities to allies and partners."

Key Takeaways: The scope and impact of President Trump's order will become clear in the coming months as the Secretary of Defense develops a funding plan and proposed implementation plan for the new system.

Technology

In his first week, President Trump took several steps affecting the federal government's approach to the regulation of technology, including artificial intelligence.

Artificial Intelligence

Recission of Prior AI Orders: On January 20, 2025, President Trump rescinded Executive Order 14110 on "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," in which President Biden had issued a series of agency actions to provide guidance on AI, govern the federal government's use of AI, and study risks from the technology.[5] Though many of the reporting obligations in that order are already complete, other measures – such as ongoing guidance, training, and risk-management practices – could be wound down absent a replacement order supporting those efforts.

AI Leadership: On January 23, 2025, President Trump issued an executive order on "Removing Barriers to American Leadership in Artificial Intelligence."[6] That order includes a policy objective of "sustain[ing] and enhanc[ing] America's AI global dominance in order to promote human flourishing, economic competitiveness, and national security." The order states that the United States should "develop AI systems that are free from ideological bias or engineered social agendas." The order directs senior White House staff to develop an "action plan" within 180 days.

Key Takeaways: While the full impact of these two orders remains uncertain, key takeaways for businesses include:

- *Shifting AI Risk Priorities*: The rescission of President Biden's Executive Order 14110 marks a significant shift in AI risk priorities relevant to companies developing AI models. Many elements of the framework set out in the revoked AI Executive Order – including its emphases on risk management, bias prevention, consumer protection, privacy and civil liberties, workforce development, and international coordination – are absent from the AI order issued by President Trump.

- *Evolving Federal Contracting Rules*: In light of shifting federal AI policy, vendors using or offering AI technology in federal contracts should carefully review any changes to federal contracting requirements regarding AI. Likewise, companies developing or commercializing AI technologies should closely monitor the action plans directed by the AI executive order.

- *Focus on AI Infrastructure*: The Trump Administration has signaled its focus on developing domestic AI infrastructure. On January 21, 2025, President Trump introduced the "Stargate" AI infrastructure project at the White House, with leadership from SoftBank, OpenAI, Oracle and MGX.[7] The Trump Administration has not acted to rescind the Department of

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4 Executive Order, *The Iron Dome for America* (January 27, 2025), available here.

5 Executive Order, *Initial Rescissions of Harmful Executive Orders and Actions* (January 20, 2025), available here.

6 Executive Order, *Removing Barriers to American Leadership in Artificial Intelligence* (January 23, 2025), available here.

7 Josh Boak & Zeke Miller, *Trump Highlights Partnership Investing $500 Billion in AI*, Associated Press (January 22, 2025), available here.

Commerce's interim final rule, issued on January 13, 2025, which revised certain export controls on advanced computing integrated circuits and added new export controls on AI model weights for certain dual-use frontier AI models.[8]

Online Platform Moderation

On January 20, 2025 President Trump signed an executive order on *Restoring Freedom of Speech and Ending Federal Censorship*, which announced the policy of the United States to "ensure that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen," ensure that "no taxpayer resources are used" for such activities, and identify and take action to "correct past misconduct by the Federal Government related to censorship of protected speech."[9] Federal agencies and officials are prohibited from using resources contrary to those principles. Additionally, the U.S. Attorney General is tasked with investigating "the activities of the Federal Government over the last 4 years that are inconsistent with the purposes and policies of this order" and preparing a report with recommendations for remedial actions.

Cryptocurrency and Blockchain

In his first week, President Trump took significant action affecting the federal government's approach to the regulation of cryptocurrency and blockchain.

<u>Digital Financial Technology Order</u>: On January 23, 2025, President Trump signed an executive order on *Strengthening American Leadership in Digital Financial Technology*.[10] The order declared the Administration's policy "to support the responsible growth and use of digital assets," including cryptocurrencies, and "blockchain technology, and related technologies across all sectors of the economy," including by protecting the ability to access and use "for lawful purposes open public blockchain networks without persecution," and "protecting and promoting fair and open access to banking services." The executive order established the President's Working Group on Digital Asset Markets, which is tasked with reviewing agencies' regulations, guidance documents, and orders affecting the digital asset sector for potential modification and rescission. The group is directed to prepare a report to recommend "a [f]ederal regulatory framework governing the issuance and operation of digital assets, including stablecoins," as well as an evaluation of "the potential creation and maintenance of a national digital asset stockpile."

The executive order also rescinded the Biden Administration's Executive Order 14067 (which directed several studies about potential digital asset regulation), and it directed the rescission of the Department of the Treasury's Framework for International Engagement in Digital Assets (which sought to pursue digital asset governance issues in international forums). The order also specifically prohibits agency action to "establish, issue, or promote" Central Bank Digital Currencies – that is, "a form of digital money or monetary value, denominated in the national unit of account, that is a direct liability of the central bank" – and terminates any ongoing efforts to do so.

<u>SEC Crypto Task Force</u>: On January 23, 2025, the SEC rescinded Staff Accounting Bulletin No. 121, which required companies to list crypto-assets held on users' behalf as liabilities on their balance sheets.[11] On January 21, 2025, Acting SEC Chairman Mark Uyeda also announced a crypto task force, led by SEC Commissioner Hester Peirce, to "help the Commission draw clear regulatory lines, provide realistic paths to registration, craft sensible disclosure frameworks, and deploy enforcement resources judiciously."[12]

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8 Department of Commerce, Bureau of Industry and Security, *Framework for Artificial Intelligence Diffusion* (January 13, 2025), available here.

9 Executive Order, *Restoring Freedom of Speech and Ending Federal Censorship* (January 20, 2025), available here.

10 Executive Order, *Strengthening American Leadership in Digital Financial Technology* (January 23, 2025), available here.

11 U.S. Securities & Exchange Commission, *Release No. SAB 122*, available here.

12 U.S. Securities & Exchange Commission, *Press Release: SEC Crypto 2.0: Acting Chairman Uyeda Announces Formation of New Crypto Task Force, Release 2025-30* (January 21, 2025), available here.

Key Takeaways: The Trump Administration's actions illustrate a focus on expanding the growth of digital financial technology and "eliminating regulatory overreach on digital assets."[13] Among the key takeaways for businesses:

- The executive order signals an effort to impose a lighter regulatory burden on digital assets, although the regulatory framework likely will not be certain until the Working Group's report has been finalized.

- The executive order marks an end to federal government support for Central Bank Digital Currencies, which had been supported by the Biden Administration.

Energy and the Environment

On January 20, 2025, President Trump issued a number of executive orders effectuating the federal government's policies on energy and the environment, both at home and abroad.

International Environmental Agreements: On January 20, President Trump issued an executive order, entitled *Putting America First in International Environmental Agreements*, announcing "the policy of [the new] Administration to put the interests of the United States and the American people first in the development and negotiation of any international agreements with the potential to damage or stifle the American economy."[14] The order directs the U.S. Ambassador to the United Nations to "immediately submit formal written notification" to the Secretary-General "of the United States' withdrawal from the Paris Agreement under the United Nations Framework Convention on Climate Change" ("UNFCCC"). That withdrawal does not become effective until at least one year after the notice of withdrawal is received. In addition, the executive order requires the U.S. Ambassador "immediately [to] submit written formal notification" to the relevant party "of the United States' withdrawal from any agreement, pact, accord, or similar commitment" made under the UNFCCC. Critically, the order does not withdraw the United States from the UNFCCC itself—the underlying framework for global climate cooperation.

Domestic Energy Activities: On January 20, President Trump issued two executive orders to encourage domestic energy production and expand domestic energy infrastructure. The first order, *Declaring a National Energy Emergency*, empowers agencies to "identify and use all relevant lawful emergency and other authorities" to "complet[e] all authorized and appropriated infrastructure, energy, environmental, and natural resources projects" and to "facilitate the supply, refining, and transportation of energy" in the Northeast, West, and Alaska.[15] Although the order draws authority from the National Emergencies Act, it also encourages reliance on federal eminent domain authorities and authorities under the Defense Production Act to achieve this objective. The second order, *Unleashing American Energy*, requires agencies to review all agency action "to identify those . . . that impose an undue burden on the identification, development, or use of domestic energy resources."[16] It establishes a one-month deadline to "develop and begin implementing action plans to suspend, revise, or rescind" "unduly burdensome" agency actions. Simultaneously, the order directs the Council on Environmental Quality to "propose rescinding" its National Environmental Policy Act regulations to expedite the permitting of energy projects.

Electric Vehicles and Renewable Energy: President Trump's executive orders have sweeping implications for the electric vehicle and renewable energy industries. *Unleashing American Energy* eliminates the electric-vehicle mandate and state emissions waivers, and "immediately" halts the disbursement of Inflation Reduction Act and Infrastructure Investment and Jobs Act funding to programs that contravene the domestic energy exploration-and-production policy outlined in the order.[17] A separate memorandum issued on January 20, "withdraw[s] from disposition for [new or renewed] wind energy leasing all areas within the

13 The White House, *Fact Sheet: Executive Order to Establish United States Leadership in Digital Financial Technology* (January 23, 2025), available here.

14 Executive Order, *Putting America First in International Environmental Agreements* (January 20, 2025), available here.

15 Executive Order, *Declaring a National Energy Emergency* (January 20, 2025), available here.

16 Executive Order, *Unleashing American Energy* (January 20, 2025), available here.

17 Office of Management and Budget Memorandum, *Memorandum to the Heads of Departments and Agencies,* (January 21, 2025), available here.

Offshore Continental Shelf" and imposes a moratorium on permitting for "onshore or offshore wind projects," at least until the completion of a "comprehensive assessment and review of [f]ederal wind leasing and permitting practices." [18]

State-Specific Directives: On January 20, 2025, President Trump issued an executive order, entitled *Unleashing Alaska's Extraordinary Resource Potential*, that announces "the policy of the United States" to "efficiently and effectively" develop and produce natural resources in Alaska; "expedite the permitting and leasing" of energy projects in Alaska; and "prioritize the development of Alaska's liquified natural gas (LNG) potential."[19] Pursuant to that policy, the order directs all agency heads to revise or rescind all agency actions limiting the development and production of natural resources in Alaska. It also restores canceled oil and gas leases within the Arctic National Wildlife Refuge.

Key Takeaways: The impacts of President Trump's executive actions will become clear in the coming weeks and months as agencies take up the mantle of implementing the new Administration's energy policies. At this stage, the key takeaways for businesses include:

- *Fossil-Fuel Industry:* Together, the executive actions reduce regulation restricting domestic energy production and reduce environmental permitting requirements for that production.

- *Renewable Energy:* The executive actions terminate federal government support for the development of electric vehicles and other green energy, such as wind. But the executive actions do not affect the rights of existing wind energy leases or eliminate investment tax credits and production tax credits for eligible projects (including the credits available under Sections 45Y and 48E for wind and solar projects).

Healthcare and Pharmaceuticals

In his first weeks in office, President Trump issued a series of executive orders impacting the healthcare and pharmaceutical sector, as well as public health.

Healthcare: On January 20, 2025, President Trump rescinded several executive orders issued by the Biden Administration related to healthcare pricing and spending.[20] The rescinded orders include one directing the Center for Medicare and Medicaid Innovation to test new models to reduce drug costs, under which the agency had developed plans to cap prescription drug prices, expand access to cell and gene therapies, and promote accelerated FDA approval of certain new therapies.[21, 22] Other rescinded orders included those establishing certain responses to the COVID-19 pandemic,[23] and expanding eligibility and enrollment periods for health insurance under the Affordable Care Act.[24] On January 29, 2025, President Trump issued an executive order stating that the federal government will not "fund, sponsor, promote, assist, or support" gender-affirming care for individuals under 19 years of age.[25]

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18 Presidential Memorandum, *Temporary Withdrawal Of All Areas On The Outer Continental Shelf From Offshore Wind Leasing And Review Of The Federal Government's Leasing And Permitting Practices For Wind Projects* (January 20, 2025), available here.

19 Executive Order, *Unleashing Alaska's Extraordinary Resource Potential* (January 20, 2025), available here.

20 Executive Order, *Initial Rescissions of Harmful Executive Orders and Actions* (January 20, 2025), available here.

21 Executive Order, *Lowering Prescription Drug Costs for Americans* (October 19, 2022), available here.

22 Centers for Medicare and Medicaid, *A Report in Response to the Executive Order on Lowering Prescription Drug Costs for Americans* (2023), available here.

23 Executive Order, *Establishing the COVID-19 Pandemic Testing Board and Ensuring a Sustainable Public Health Workforce* (January 26, 2021), available here.

24 Executive Order, *Strengthening Medicaid and the Affordable Care Act* (February 2, 2021), available here.

25 Executive Order, *Protecting Children from Chemical and Surgical Mutilation*, (January 29, 2025), available here.

Public Health: On January 20, 2025, President Trump issued an executive order withdrawing the United States from the World Health Organization ("WHO").[26] Per the WHO's governing rules, that notice of withdrawal will take effect twelve months later, in January 2026. However, President Trump has subsequently indicated openness to rejoining WHO if the organization makes certain operational changes.[27] The administration also directed the Department of Health and Human Services to pause all public communications regarding public health issues, including regular publications and advisories issued by agencies such as the Centers for Disease Control and Prevention.[28] Media reporting suggests that pause will end on February 1, 2025, and the President's nominee for HHS Secretary has said "[t]here are exceptions for announcements" deemed "mission critical."[29]

Key Takeaways: These actions suggest that the Trump Administration is moving quickly to set new priorities for healthcare spending, pharmaceuticals, and public health policy. While those new priorities take shape, near-term impacts may include:

- Delays in funding for recipients of grants from the National Institutes of Health, Food & Drug Administration, and other agencies within HHS.
- Limited updates to federal health databases and incident alerts.
- Changes to health insurance coverage for patient populations enrolled under the Affordable Care Act.
- Changes to procedures covered under Medicare, Medicaid, and federal employee insurance programs.

Regulatory Administration

In his first weeks, President Trump issued multiple executive orders focused on regulatory administration, including an Order freezing the promulgation of all new regulations. President Trump also rescinded multiple Executive Orders that could affect how agencies promulgate rules during his Administration.

Regulatory Freeze: On January 20, 2025, President Trump issued an executive order directing "all executive departments and agencies" to take multiple steps to temporarily stop the issuance of all new regulations and possibly extend effective dates for issued – but not yet effective – rules.[30] This order is consistent with action taken by prior Presidents, including President Biden.[31]

This order directs all agencies and departments to refrain from "propos[ing] or issu[ing] any rule in any manner . . . until a department or agency head appointed or designated by [President Trump] reviews and approves the rule," and further directs all agencies and departments to "[i]mmediately withdraw any rules that have been sent to the [Office of the Federal Register] so that they can be reviewed and approved" as provided above. Furthermore, the order further provides that all agencies and departments should "consider postponing for 60 days . . . the effective date for any rules that have been published in the Federal Register, or any rules that have been issued in any manner but have not taken effect, for the purpose of reviewing any questions of fact, law, and policy that the rules may raise." During this 60-day time period, these agencies and departments should "consider opening a comment period to allow interested parties to provide comments about issues of fact, law, and policy raised by the rules postponed under this memorandum, and consider reevaluating pending petitions involving such rules."

26 Executive Order, *Withdrawing the United States from the World Health Organization* (January 20, 2025), available here.

27 Reuters, *Trump Says He May Consider Rejoining World Health Organization* (January 25, 2025), available here.

28 Washington Post, *Trump Officials Pause Health Agencies' Communications, Citing Review* (January 21, 2025), available here.

29 Washington Post, *Health Researchers Alarmed As Trump Administration Pauses Travel, Communications* (January 23, 2025), available here.

30 Executive Order, *Regulatory Freeze Pending Review* (January 20, 2025), available here.

31 Memorandum, *Memorandum for The Heads of Executive Departments and Agencies* (January 20, 2021), available here.

Rescission of Regulatory Executive Orders: On January 20, President Trump rescinded a number of executive orders issued by President Biden related to regulatory administration.[32]

As relevant here, President Trump rescinded:

- Executive Order 13992, which itself had rescinded various regulatory reforms from the first Trump Administration.[33] Most notably, President Trump reinstated an executive order which had required that "whenever an executive department or agency [ ] publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed," and further obligated that each agency shall "identify, for each regulation that increases incremental cost . . . the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation."[34] The rescission of Executive Order 13992 also reinstated executive orders on: 1) implementing regulatory reforms, 2) limiting the number of federal advisory committees, 3) limiting the use or legal effect of agency guidance documents, 4) instituting a policy that "[n]o person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice," and 5) offsetting budgetary costs of discretionary agency actions.

- Executive Order 14094, which had implemented various changes to "modernize the regulatory process."[35] These changes included increasing the monetary threshold for "significant regulatory action," specifying ways that "regulatory actions should be informed by input from interested or affected communities," and providing that regulations "shall recognize distributive impacts and equity."

Congressional Review Act: In addition to the regulatory changes directed by executive order, President Trump and the 119th Congress may nullify regulations that were promulgated by federal agencies at the end of the Biden Administration under the Congressional Review Act ("CRA"). Under the CRA, federal agencies must submit new regulations to Congress before those rules can take effect. Congress then has 60 days to rescind those rules by enacting a joint resolution of disapproval via simple majority in each chamber. A rule that has been rejected through this process "shall have no force or effect" and "may not be reissued in substantially the same form" nor may "a new rule that is substantially the same as such a rule . . . be issued."[36] With Republicans in control of both the House and Senate, President Trump has the ability to nullify many of the previous Administration's regulations.

DOGE: On January 20, 2025, President Trump issued an executive order entitled *Establishing and Implementing the President's "Department of Government Efficiency,"* commonly referred to as "DOGE."[37] The order creates DOGE by "renam[ing]" the United States Digital Service as the "United States DOGE Service" and declaring it "established in the Executive Office of the President." The USDS Administrator "shall report to the White House Chief of Staff" and "within USDS," there will be established "a temporary organization known as 'the U.S. DOGE Service Temporary Organization,'" which will be terminated on July 4, 2026. The order states that the mission of DOGE is "modernizing [f]ederal technology and software to maximize efficiency and productivity" and stated that it shall undertake an initiative to "improve the quality and efficiency of government-wide software, network infrastructure, and information technology (IT) systems."

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32 Executive Order, *Initial Rescissions Of Harmful Executive Orders And Actions* (January 20, 2025), available here.

33 Executive Order, *Revocation Of Certain Executive Orders Concerning Federal Regulation* (January 20, 2021), available here.

34 Executive Order, *Reducing Regulation and Controlling Regulatory Costs* (January 30, 2017), available here.

35 Executive Order, *Modernizing Regulatory Review* (April 6, 2023), available here.

36 5 U.S.C. §§ 801(a)(5)(b)(2), 802(a).

37 Executive Order, *Establishing And Implementing The President's "Department Of Government Efficiency"* (January 20, 2025), available here.

Federal Hiring Freeze: On January 20, 2025, President Trump issued an executive order instituting a "freeze on the hiring of Federal civilian employees, to be applied throughout the executive branch."[38] Specifically, the order provides that the Office of Management and Budget (OMB), in consultation with the Office of Personnel Management and DOGE, "shall," within 90 days, "submit a plan to reduce the size of the Federal Government's workforce through efficiency improvements and attrition." With the exception of the IRS, the hiring freeze will end "upon issuance of the OMB plan." Regarding the IRS, the freeze will remain until the Treasury Department, in consultation with OMB and DOGE, determines "that it is in the national interest to lift the freeze." The freeze does not apply to "military personnel of the armed forces or to positions related to immigration enforcement, national security, or public safety."

In-Person Work: On January 20, 2025, President Trump issued a memorandum directing the "[h]eads of all departments and agencies" to "take all necessary steps to terminate remote work arrangements and require employees to return to work in-person at their respective duty stations on a full-time basis," subject to "necessary" exemptions.[39]

Federal Funding Freeze: On January 27, 2025, the Office of Management and Budget issued a memorandum temporarily pausing federal grants, loans, and other financial assistance programs.[40] Impacted programs included NIH research grants and some clean energy grants, but other programs including Social Security, Medicare, and federal student loans and Pell grants were not frozen. A federal court enjoined the order on January 28, 2025, before the memorandum was due to take effect, and on January 29, 2025, OMB rescinded the order.[41]

Key Takeaways: The series of government-wide actions demonstrates the new administration's willingness to leverage funding and administrative tools to pursue its policy goals.

DEI Programs and Employment

As we noted in greater detail in a recent client memorandum, in his first week, President Trump issued a number of executive orders to eliminate diversity, equity and inclusion programs and policies and to protect "single-sex spaces and activities designed for women."[42]

DEI: On January 21, 2025, President Trump issued an executive order entitled *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*.[43] This order states that it is the "policy of the United States . . . to promote individual initiative, excellence, and hard work," and orders all executive departments and agencies "to terminate all discriminatory and illegal" DEI policies and practices in the federal government.

In addition to revoking several prior executive orders regarding federal DEI policies, the order impacts federal contractors, the private sector, and educational institutions:

- *Federal contractors*: The order revokes Executive Order 11246, which required equal opportunity and nondiscrimination in government contracting, and directs the Office of Federal Contract Compliance Programs to stop "promoting diversity." The

38 Executive Order, *Hiring Freeze* (January 20, 2025), available here.

39 Presidential Memorandum, *Return To In-Person Work* (January 20, 2025), available here.

40 *Memorandum for Heads of Executive Departments and Agencies*, Office of Management and Budget (January 27, 2025), available here.

41 Washington Post, *Trump White House Reverses Course, Rescinds Freeze on Federal Grants* (January 29, 2025), available here.

42 *President Trump Issues Executive Orders Targeting DEI Programs and Gender Identity-Based Legal Protections*, Paul, Weiss (January 24, 2025), available here.

43 Executive Order, *Ending Illegal Discrimination And Restoring Merit-Based Opportunity* (January 21, 2025), available here.

order requires every recipient of a government contract or grant award to "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws," and gives federal contractors 90 days (by April 21, 2025) to become compliant.

- *Private sector*: The order directs the Attorney General to "encourage the private sector to end illegal discrimination and preferences." To that end, the order directs the Attorney General to submit a report within 120 days with a list of the "most egregious and discriminatory DEI practitioners in each sector of concern" and a "proposed strategic enforcement plan," including identifying potential investigations, litigation and regulatory action.

- *Educational institutions and agencies*: The order directs the Attorney General and Secretary of Education to issue guidance within 120 days to educational entities that receive federal funds or grants or participate in the federal student loan assistance programs regarding measures to end race-based affirmative action programs in university admissions.

Executive Order on Gender: On January 20, 2025, President Trump issued an executive order specifically addressing gender, titled *Defending Women From Gender Ideology Extremism And Restoring Biological Truth To the Federal Government*.[44] The Order states that it is now "the policy of the United States to recognize two sexes, male and female" and directs the Executive Branch to enforce "sex-protective" laws to promote this policy. The order directs the Secretary of Health and Human Services to provide "public clear guidance expanding on the sex-based definitions" and directs the Attorney General and federal agencies to: (1) immediately issue guidance effectuating this new federal policy eliminating legal recognition and protections on the basis of transgender, nonbinary and intersex status; and (2) "prioritize investigations and litigation" to enforce the new policy.

Key Takeaways: These orders suggest that private-sector enforcement will be a priority in the near term. While these orders do not require immediate action from the private sector (with the exception for federal contractors), businesses and private employers can expect increased scrutiny of DEI policies and programs and should carefully review their policies and programs to mitigate risks, including:

- For federal government contractors, immediate review of programs and policies to ensure that they "[do] not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws," with compliance required by April 21, 2025;

- Review of DEI policies and programs, particularly those that provide any benefit or priority on the basis of race or another protected category, to address the risk of impending investigations and litigation;

- Review of hiring, promotion, and compensation policies to ensure equal opportunity; and

- Review of gender identity-based policies and practices to ensure compliance with the executive order on gender and any subsequent guidance.

Immigration and Border Security

In his first week, President Trump issued a series of Executive Orders that affect immigration policy and border security.

Immigration and Citizenship: The Trump Administration has taken several steps to limit immigration and increase enforcement of existing laws.[45] These measures include increased vetting requirements for visa applicants; identifying "any actions necessary"

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44 Executive Order, *Defending Women From Gender Ideology Extremism And Restoring Biological Truth To the Federal Government* (January 21, 2025), available here.

45 Executive Order, *Protecting The American People Against Invasion* (January 20, 2025), available here.

to be taken against foreign nationals "who provide aid, advocacy, or support for foreign terrorists,"[46] restricting entries at the southern border,[47] and resuming certain migration policies from the first Trump Administration.[48] President Trump also issued an executive order restricting the scope of birthright citizenship, including by denying citizenship to children born in the United States to parents with temporary work visas.[49] That order was temporarily enjoined by a federal district court on January 23, 2025, and is subject to ongoing litigation in other venues.

Border Security: On January 20, 2025, President Trump declared a "national emergency . . . along the southern border of the United States"[50] and issued an executive order directing the Armed Forces to "prioritize the protection of the sovereignty and territorial integrity of the United States along our national borders."[51] Together, these two actions direct the Secretaries of Defense and Homeland Security to deploy additional troops to the southern border, build additional physical barriers, and use other means to secure the border.

Key Takeaways: At this stage, the key takeaways for businesses, though uncertain, include:

- *Impacts on Global Business*: Businesses may experience delays in visas for foreign workers, as well as increased wait times and heightened scrutiny at ports of entry.

- *Impacts on Higher Education*: Universities will need to address the immigration status of foreign students, researchers, and faculty, including immigration enforcement efforts on campuses.

Paul, Weiss Will Continue to Monitor Developments

In this period of significant and accelerated regulatory change, Paul, Weiss is closely monitoring new executive actions to help our clients navigate the rapidly changing regulatory environment. This overview will be continually updated by Paul, Weiss to inform the business community about key executive actions carried out by the Trump Administration and discuss their commercial and other implications.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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46 Executive Order, *Protecting The United States From Foreign Terrorists And Other National Security And Public Safety Threats* (January 20, 2025), available here.

47 Presidential Proclamation, *Guaranteeing The States Protection Against Invasion* (January 20, 2025), available here.

48 Executive Order, *Securing Our Borders* (January 20, 2025), available here.

49 Executive Order, *Protecting The Meaning And Value Of American Citizenship* (January 20, 2025), available here.

50 Presidential Proclamation, *Declaring A National Emergency At The Southern Border Of The United States* (January 20, 2025), available here.

51 Executive Order, *Clarifying The Military's Role In Protecting The Territorial Integrity Of The United States* (January 20, 2025), available here.

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A turning point? Merger Control, Foreign Direct Investment and Foreign Subsidies Regulation in 2025

Five Key Developments and Trends Impacting Global Deal-Making in 2025

Changes in the leadership of merger enforcement agencies in the United States, United Kingdom and European Union, together with recent enforcement developments, have the potential to impact global deal-making in 2025, at a time when many are anticipating an uptick in deal volumes.

Although it is very early days for the new administration in the United States, many are expecting continued robust antitrust enforcement, albeit under more traditional theories of harm. In the EU and UK, we are seeing an agenda shaped by political pressure to drive economic growth and competitiveness. All of this is against a significant prior period of intense scrutiny of, and challenge to, global transactions. Here are five important developments that are set to impact global deal-making in the coming year.

1. Changes in leadership come with changes in priorities

New US DOJ and FTC Leadership are likely to revert to a more traditional enforcement approach

- President Trump nominated Abigail Slater to be Assistant Attorney General for Antitrust at the U.S. Department of Justice (DOJ). Ms. Slater has extensive antitrust enforcement experience. She spent ten years at the Federal Trade Commission (FTC), including as adviser to a former commissioner, and was a tech policy adviser on the National Economic Council during the first Trump administration.

- The President designated Andrew N. Ferguson, a Republican FTC commissioner since April 2024, as chairman on January 20, 2025. Former Chair Lina M. Khan left the FTC on January 31. Mr. Ferguson was formerly Solicitor General of the Commonwealth of Virginia, counsel to Sen. Mitch McConnell (R-Kentucky), counsel to the Republicans on the Senate Judiciary Committee, clerk to Justice Clarence Thomas and clerk to Judge Karen LeCraft Henderson on the D.C. Circuit Court of Appeals.

- The President nominated Mark Meador to be an FTC commissioner for a term of seven years from September 26, 2024. Mr. Meador, who would give the Republicans a majority on the Commission, was in private practice and held positions at the DOJ Antitrust Division and FTC. He later advised Sen. Mike Lee (R-Utah) on antitrust issues and was antitrust counsel on the Senate Judiciary Committee.

- Based on antitrust enforcement in the first Trump administration and statements about enforcement policy in the current administration, we anticipate that the incoming U.S. antitrust agencies will:

- continue to focus on "big tech";
- thoroughly investigate vertical mergers;
- be less skeptical of private equity acquirers compared to the Biden administration;
- revert to more traditional theories of competitive harm in merger challenges;
- reinstate early terminations of the HSR waiting period for deals that clearly do not have competitive issues; and
- show greater willingness to accept consent agreements with structural remedies to fix mergers, rather than litigating to prohibit them.

A new EU Commissioner with a blended agenda

- The new EU Competition Commissioner, Teresa Ribera, took office on December 1, 2024. As Commissioner for a Clean, Just and Competitive Transition, her formal title (and past experience) emphasizes sustainability and tackling climate change. The new Commission is seeking to develop the interface between antitrust and sustainability as blended objectives, while also driving a program of regulatory simplification.

- Taking its cue from the Draghi report, the Commission published its Competitiveness Compass – a "roadmap to restore Europe's dynamism and boost our economic growth" on January 29, setting out its key priorities to reignite growth in Europe. Regulatory simplification is one of the cross-sector enablers to drive greater innovation and competitiveness, making business in Europe easier (although the initial focus is not on antitrust regulation). Some Member States and business associations have called for lighter-touch merger control. Others have gone a step further and are pushing for more permissive merger control enforcement, giving more prominence to innovation and investment in or beyond strategic sectors, as part of an agenda to support growth and Europe as a global player. Some Member States do not appear to agree with this nor do smaller businesses or consumer organizations. Commissioner Ribera will need to navigate this challenging environment and find answers to conflicting expectations in the up-coming review of the horizontal merger guidelines.

- Pending that review, we may see increased pressure to allow the creation of the famed "European champions" in strategic sectors, or to block takeovers from outside the EU. The telecom sector could be one candidate where a deepening of the single market may help to make European consolidation acceptable from a competition policy perspective. Commissioner Ribera will need to devote her attention early on in her mandate to address the vexed question of how to set jurisdictional rules so as to catch mergers that are harmful to competition but which are below the current jurisdictional thresholds (see further point 4 below).

- More broadly, we expect a focused effort on streamlining and speeding up antitrust enforcement, particularly as regards exclusionary abuse cases in sectors with little competition. We also anticipate an ambitious simplification of state aid rules, notably in sectors of strategic importance for the greening of the EU economy, resilience and innovation. We expect a push to enable major EU and domestic funding projects in strategic areas and a review of public procurement rules to support industrial goals and enable European businesses to be preferred. Based on recent statements by Commissioners Ribera and Virkkunen (responsible for digital matters), we do not expect the Commission to heed the calls of the Trump administration to go easy on U.S. companies in the enforcement of EU digital regulation. Finally, other members of the new Commission have signaled a more geostrategic use of enforcement powers under foreign direct investment (FDI) regimes and the EU foreign subsidies regulation (FSR) to protect EU objectives such as boosting EU economic sovereignty and promoting European competitiveness.

UK CMA under intense political scrutiny to drive growth

- The UK government is on the warpath against regulators perceived to be using red tape to block investment and growth in the UK. The CMA ended 2024 with a number of public statements seeking to emphasize its pro-growth credentials, focusing on delivering the "four Ps" of proportionality, predictability, process and pace. It issued a draft Annual Plan with pro-growth actions ostensibly woven through its agenda and objectives. On the same day, it announced the establishment of the Growth and Investment Council, as part of its drive to engage better with businesses "to help identify opportunities for competition to unlock growth and investment." Finally, it indicated in late 2024 that it was taking a new approach to behavioral remedies in merger cases and would consult on this in 2025.

- However, this was clearly not considered sufficient by the government. The CMA's Chair, Marcus Bokkerink, was unexpectedly ousted by the government in January and replaced by Doug Gurr (formerly leader of Amazon's UK and China businesses) as interim Chair. The UK Chancellor (finance minister) has made it clear that greater change is needed. The interim CMA Chair has highlighted the need for efficiency, with simple, rapid processes and good, clear decisions; expertise to ensure case teams are up to speed with sectors they are investigating; and engagement with the business community to address issues that disincentivize investment. In concrete terms, we expect significant revisions to the contents of the draft Annual Plan (due to be published by the end of March), and a new robust "Strategic Steer" from the government to shape the CMA's approach alongside a Chair drawn from the business community with a hand firmly on the institutional wheel.

- It is not yet clear how process and procedure may change in individual cases (there is certainly scope to reduce the length and complexity of pre-notification), or whether changes will impact on the fundamentals of substantive analysis. The CMA signaled at the end of 2024 that it will be taking greater note of post-merger efficiencies, and a more creative and constructive approach to remedies earlier in the merger review process (see point 5 below). However, as a statutory body, the CMA is subject to an overarching duty to "promote competition, both within and outside the United Kingdom, for the benefit of consumers".

- How far the government can expect the CMA to rebalance its approach in favor of businesses remains to be seen – certainly the interim Chair has already warned that it will "never move away from a belief in the power of competition and consumer protection" and described its north star as "a regulatory environment that encourages the greatest possible level of business investment, subject to respecting the absolute importance of healthy competition and strong consumer protection." We therefore expect tangible change – certainly in the short- to mid-term – but that it will be within the parameters of discretion of the CMA, particularly with regard to procedure. Any structural change to the CMA such as the Phase 2 panel process and its functions would require legislation and so would take longer.

2. Notification obligations and/or thresholds are changing

New increased U.S. pre-merger filing obligations with expansive disclosure

- The effective date of overhauled Hart Scott-Rodino (HSR) filing rules is February 10, 2025. This means that the new rules will apply to all deals filed after 5 pm (U.S. Eastern time) on February 7, 2025. They impose significantly greater burdens on filers and will likely lengthen HSR filing preparation timelines dramatically (our client memo explains more). PE funds may bear the greatest burden given the complexity of typical transaction structures and the breadth of their portfolios. Several business groups have challenged the validity of the new rules. It is possible that the effective date could be postponed either by the court hearing that challenge, or by the FTC itself (our client memo explains more). However, the ability of the FTC to act may be hampered by its current 2-2 split between Democratic and Republican Commissioners. And at the time of writing, plaintiffs in the court challenge have not moved for interim relief.

New UK merger thresholds

- Revised UK merger control thresholds took effect on January 1, applicable to any transaction not completed before that date, unless the CMA's Phase 1 review had already started. A new "hybrid test" is designed to catch low turnover/high value deals, as well as those with no substantive overlap, including vertical and conglomerate deals. Digital businesses designated with "strategic market status" will have to inform the CMA of smaller mergers. Our client memo explains more.

EU merger control jurisdiction unchanged … for now

- The EU merger regulation thresholds remain unchanged although the fall-out from the overturning of the Commission's use of mechanisms to review below-threshold mergers will continue, including driving consideration of future reforms (see point 4 below). The risk of a below-threshold transaction being called in by a Member State and then referred up to the Commission has been cited by business groups as a brake on investment in the EU: it is clear that greater clarity about regulatory risk would be welcome in this area, particularly as ongoing litigation on this issue will take time to reach a resolution.

FDI notification obligations continue to proliferate in the EU

- Following the introduction of the Swedish FDI regime in 2024 and Irish FDI regime in early 2025, there will be only three EU Member States without active FDI regimes: Greece, Cyprus and Croatia. However, each has draft rules in the pipeline, so it will not be long before all 27 EU Member States have active FDI regimes. Regimes already in place are increasingly active. While the EU has draft legislation in train to generate more alignment between Member States' regimes and between investigations into the same matter, this remains some way in the distance. Centralized European Commission decision-making in relation to FDI is a political red line for Member States. In addition to inwards investment control, the EU is monitoring market activity to establish whether outbound investment controls are needed, in particular to address the risk of technology and know-how leakage that is not adequately protected through the export controls regime.

Unclear whether the UK government will reduce NSIA red tape

- In the UK, despite significant pressure on regulators to reduce red tape and disincentives to investment, the government has not flagged any intention to address the proportionality and process of the National Security and Investment Act 2021 (NSIA) regime. This includes implementing reforms proposed by the last government, including the introduction of much-sought-after carve-outs for liquidators involved in financial restructurings, and technical notifications for straightforward internal re-organizations, with limited scope for national security risks to arise (if any). We have called for wider reforms to align the NSIA regime better with UK industrial strategy, including carving out purely UK domestic transactions from the notification regime and creating fast tracks investors from close UK allies. Our client memo reviews the statistics on NSIA enforcement to April 2024.

U.S. CFIUS regime likely to be a rare area of continuity

- Current CFIUS, outbound investment and export controls regimes reflect initiatives from the first Trump administration. Using national security authorities to address the multifaceted threat posed by China was then continued and expanded upon by the Biden administration. Accordingly, U.S. national security policy is likely to be a rare area of continuity in the years to come. Our client memo explains the highlights of the past year in relation to the CFIUS, outbound investment and export control regimes, with a further client memo offering an overview of the new outbound investment regime.

FSR disclosure obligations continue to place significant burdens on companies

- Since the EU's foreign subsidies screening mechanism came into force in October 2023, the Commission has continued to insist on extensive information disclosure beyond reporting obligations, such as disclosing LP commitments in PE funds and even foreign financial contributions below the €1 million threshold. Calls for a simplified procedure currently remain unanswered, with officials indicating that any changes to the regime before the planned formal guidance is issued in early 2026 are highly unlikely.

3. Skies brightening for PE investors?

A fair(er) wind for PE deals in the U.S.?

- During the first Trump administration, antitrust enforcers had a neutral to benign view of private equity. For example, a since-rescinded Mergers Remedy Manual issued by the DOJ during the first Trump administration recognized that "in some cases a private equity purchaser may be [a] preferred" purchaser of divestiture assets. At the very least, according to the manual, the DOJ used "the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms."

- In contrast, during the Biden administration, the agencies viewed private equity with skepticism. For example, former FTC Chair Lina Khan questioned whether private equity "business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations." The current Merger Guidelines have a lengthy discussion of "roll-up" strategies. Several enforcement actions were directed at private equity firms, one of which, for example, resulted in a consent decree that imposed prior approval and prior notice provisions out of a concern that private equity firms "increasingly engage in roll-up strategies that allow them to accrue market power off the Commission's radar" (i.e., that are not reportable under the HSR Act).

- An early indication that the new administration might be less inclined to single out private equity comes from then-Commissioner (now Chairman) Ferguson's statement in an administrative action against private equity respondents in a matter challenging several acquisitions of anesthesiology practices in Texas. The then-FTC majority characterized this as a competitively problematic "antitrust roll-up scheme case" in line with the 2023 Merger Guidelines. Mr. Ferguson took issue. He explained in a concurring statement, joined by Commissioner Holyoak, that the majority "suggest that this case is extraordinary because it involves 'private equity' and 'serial acquisitions,' and hint at antipathy toward private equity." His view, however, is that "this case is an ordinary application of the most elementary antitrust principles" and there is "no reason for the Commission to single out private equity for special treatment."

An easier passage for roll-ups in the UK?

- The CMA recently addressed the perception that it is "interventionist" as regards PE deals, and, whether justified or not, acknowledged that this could have a chilling effect. It referred to the need to balance protecting future innovation and potential competition with ensuring the flow of entrepreneurial capital that could itself drive innovation. It also recognized the burden on businesses of a CMA merger investigation (which, given the voluntary nature of the UK regime, is rarely a rubber-stamping process). The CMA also recognized that internal roll-ups are important both for enabling smaller firms to scale and for investors to achieve an exit. Those statements may not have gone far enough, however. As noted above, the government has since replaced the CMA Chair in order to establish a new growth-driving approach to antitrust enforcement.

- We may therefore see a softening of the CMA's focus on looking out for PE roll-ups. Just as important, though, is the issue of the regulatory burden of notification and review and the CMA will need to address the ever-lengthening duration of pre-notification discussions, which now average around three months before the eight week clock starts and can last for much longer.

BAU for EU merger clearance

- The mandatory notification requirements under the EU Merger Regulation will continue to mean regular EU filings for PE-backed transactions. In our experience, PE purchasers are not treated differently to other acquirers in the EU. As noted above, business organizations have flagged the regulatory burden of the merger regime on notifying parties and third parties – any reduction in red tape as part of the general EU drive for regulatory simplification would, of course, be welcomed. As noted, regulatory simplification is a core theme of the new Commission's Competitiveness Compass driving for economic growth. While merger control is not part of the first simplification omnibus proposals, more generally there is a drive to consider speeding up antitrust procedures.

- Foreign investment controls around the EU are a more complex landscape to navigate, mainly because of the diversity and divergences between these regimes. As noted, future reforms to FDI within the EU may generate greater alignment and better coordination across the Member States, but this remains some way off.

4. Below-threshold mergers continue to vex in EU but other agencies have it covered

The challenge of "killer acquisitions"

- Concerns about preserving potential competition and innovation, combined with the focus on ensuring the contestability of digital and tech markets, have put a spotlight on ensuring enforcers can review the impact of high value acquisitions of early stage businesses with low turnover, which often fall below merger control thresholds. This has been a particular concern in the EU.

EU - new approaches and a thresholds review

- The ECJ's landmark decision in *Illumina/Grail* in September 2024, stopped the Commission from accepting merger control jurisdiction from EU national competition authorities (NCAs) where their own domestic merger thresholds are not met (our client memo explains more). However, a possible loophole remains where NCAs use call-in powers to take jurisdiction over a below-threshold transaction. Italy's use of call-in powers in order to refer the *NVIDIA/Run:ai* deal to the Commission is the first test of this approach. The Commission accepted jurisdiction and cleared the transaction without conditions in late 2024. However, NVIDIA has appealed the case, challenging the basis of the Commission's jurisdiction. In parallel, the Commission will be reviewing EU legislative thresholds, although with no commitment to making changes. We do not expect any legislative change in 2025 and judgment in the NVIDIA appeal before the end of the year is unlikely. We expect the Commission to continue to accept jurisdiction based on NCAs exercising call-in powers in the meantime – although as noted, this can generate significant deal risk for parties which is difficult to quantify and may, therefore, operate as a disincentive to investment.

U.S. – no threshold-based restrictions on jurisdiction to review

- The concept of "killer acquisitions" as potentially harming competition has been the basis for several merger challenges and is included in the DOJ-FTC Merger Guidelines. The size of the transaction is no impediment to a full agency review. Certain deals are exempt from federal pre-merger notice and waiting requirements because they fall below the relevant reporting thresholds. However, the agencies have several means to alert them to non-reportable transactions, including routine surveillance of industry trade publications or expressions of concern from industry participants. They can challenge mergers they determine to be anticompetitive regardless of size (assuming there is an effect on interstate commerce). Furthermore, merger challenges can be brought both before and after a deal closes. State attorneys general are empowered to bring merger challenges in federal court. Individual states have antitrust laws that can be used to challenge anticompetitive mergers in state courts. Federal law also provides for a private right of action.

New UK "hybrid" threshold to capture killer acquisitions and non-horizontal mergers

- As noted, the UK has already taken steps to address the scope of its jurisdiction. The revised UK merger thresholds that took effect on January 1, 2025 include a "hybrid" threshold designed with "killer acquisitions" (and vertical or conglomerate mergers) in mind. A new information obligation for digital businesses designated as having significant market status will create transparency for below threshold acquisitions (although this will be a slow build – the first designation processes have just commenced). The regulatory risk in the UK for these deals, particularly in relation to AI and tech markets, is not focused on jurisdiction, but on the CMA's very cautious approach – as the CMA's Chief Executive recently recognized, some perceive the CMA case teams to be looking for problems.

- In particular, pre-notification scrutiny has become steadily more drawn out in relation to both jurisdiction and substantive issues before a decision is taken on whether to start the statutory clock to review a deal formally. The scrutiny applied to various AI partnerships and investments have been notable examples of this from the CMA over the last year. Indeed, some have been under scrutiny for over a year without a decision on jurisdiction being announced, and others have involved detailed disclosure and review of internal documents of the parties – despite the fact that the CMA ultimately concluded that it did not have jurisdiction (under the pre-2025 thresholds).

5. Deal parties may encounter changed and diverging approaches to remedies

Reinstated openness to structural merger remedies in the U.S.

- Until recently, merger remedies in the form of consent decrees requiring divestitures or conduct restrictions were commonplace. In the first Trump administration, the DOJ instituted a policy strongly disfavoring conduct or behavioral remedies. To be acceptable to the DOJ, a remedy had to be structural—that is, involve business unit divestiture. During the Biden administration, the DOJ did not accept formal remedies prior to commencing litigation. Instead, the DOJ sought full-stop injunctions for deals they determined to be anticompetitive. We anticipate that the current Trump administration will revert to the prior approach of accepting structural remedies where they address competitive concerns.

No change for merger remedies in the EU?

- The Commission prohibits a merger outright only where no suitable remedy can be identified. There is a strong preference for structural remedies that create a permanent solution requiring minimal monitoring or future enforcement. There have been no signs that this approach will change under the new Commissioner – indeed, Commission officials have expressed disapproval of the UK CMA's recent acceptance of investment commitments in *Vodafone/Hutchison* (discussed below) as risking customer harm, due to insufficient competition at the national level (the Commission plans instead to use regulatory change to enable telecom sector consolidation within Member States). However, as discussed in point 1 above, we expect a review of the horizontal merger guidelines, in particular to ensure support for innovation and intensity of investment in strategic sectors, which may play into remedy design. It remains to be seen whether the Commission will face political pressure to soften its stance in strategic sectors.

CMA's new creative and collaborative approach to merger remedies

- Even before the recent replacement of the CMA Chair, the CMA had signaled a new openness to exploring behavioral remedies, including those which lock in rivalry-enhancing efficiencies and preserve relevant customer benefits. Recent statistics show a tangible uptick in the number of Phase 2 cases closed with behavioral remedies. Most notable was the acceptance in late 2024 of novel behavioral investment-focused remedies in *Vodafone/Hutchison*. Similar transactions in mobile telecoms markets have been prohibited; indeed the last major UK consolidation was blocked by the European Commission with the strong support of the CMA, due to concerns over market concentration. However, the CMA cleared the deal subject to behavioral remedies focused on delivering an eight-year investment plan in network upgrades, together with price protections for retail and wholesale customers. Greater openness to creative remedies could signal a tangibly more favorable deal environment in the UK than in recent years.

FDI remedies remain nation-specific

- Opacity remains the default for FDI regimes, in contrast to typically well documented and reasoned remedies under merger control reviews. Coordination between Member States is provided for within the EU by the FDI screening regulation but cannot be assumed or expected beyond the EU – by definition, domestic concerns and each government's priorities shape FDI and national security decisions. Our recent experience in relation to the UK government's clearance of EP Corporate Group/International Distribution Services (owner of Royal Mail) in the UK has been that the new government took a constructive approach and was open to discussion to allow the parties to understand concerns in order to shape economic commitments – acquirers will welcome this. On national security aspects, however, there is very limited engagement with those responsible for FDI enforcement to discuss concerns or remedies.

EU FSR remedies showing signs of flexibility

- The EU FSR regime is now a little over a year old (our client memo reports on the first year). It remains fairly opaque, although guidance has been issued and the Commission now publishes the fact of notifications. Clearance after the initial 25 working day review period/Phase 1 occurs by way of a confirmation letter from the Commission that the review has ended (which is not published). There is no reasoned decision. The Commission has signaled a more geostrategic use of this regime to protect EU businesses and drive EU objectives, although this already appears to be the case: with one exception, all known enforcement action to date by the Commission has targeted Chinese companies. The exception concerned the acquisition by Emirates-backed e& of telecoms businesses in the EU. This was the only in-depth/Phase 2 FSR case to date where remedies have been imposed. The Commission took a less absolute approach to remedying subsidies judged to be distorting than it does under the EU's internal State aid regime, accepting behavioral remedies to remove the impact of foreign subsidies from the EU, rather than insisting they were removed outright (our client memo discusses the decision in more detail).

Conclusion

As geopolitical tensions continue and new administrations take office, 2025 is set to be a year of tensions and reckonings amongst competition, FDI and FSR agencies around the world. Despite some positive signs in the UK and EU, the regulatory burden faced by deal-makers shows no signs of reducing – and will significantly increase in the US if the new HSR form comes into effect – making regulatory preparedness and flexibility more important than ever before when looking to execute deals in an increasingly competitive marketplace.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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President Trump Issues Executive Order Signaling a Push to Designate Drug Cartels as Foreign Terrorist Organizations

On his first day in office, President Trump issued an executive order declaring a national emergency and establishing a process for designating certain international cartels and other organizations as Foreign Terrorist Organizations or Specially Designated Global Terrorists.[1] The designation of drug cartels as Foreign Terrorist Organizations ("FTO"), a label traditionally reserved for terrorist organizations like Al Qaeda, Boko Haram, and ISIS, would further increase the risks of U.S. and non-U.S. companies operating in certain countries in Latin America whose business operations may at times come into contact with cartel activity. For example, companies may face legal exposure by making ransom payments, paying protection money, or knowingly engaging in business dealings with companies owned by cartels.

Background

Foreign Terrorist Organizations

Section 219 of the Immigration and Nationality Act authorizes the president to "designate an organization as a foreign terrorist organization" if he concludes that "the organization is a foreign organization," "the organization engages in terrorist activity," and "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States."[2] Once an organization is designated as an FTO, "the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets [of that organization] to block all financial transactions involving those assets."[3]

Pursuant to this statute, the State Department maintains a list of FTOs.[4] There are currently 68 organizations on this list. The two most recent additions were made in 2021, when the State Department added FARC and Segunda Marquetalia (both Colombian) to the list.

1 Designating Cartels And Other Organizations As Foreign Terrorist Organizations And Specially Designated Global Terrorists ("Executive Order"), THE WHITE HOUSE (Jan 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/designating-cartels-and-other-organizations-as-foreign-terrorist-organizations-and-specially-designated-global-terrorists/.

2 8 U.S.C. § 1189(a)(1).

3 *Id.* § 1189(a)(2)(C).

4 Designated Foreign Terrorist Organizations, U.S. STATE DEPARTMENT, https://www.state.gov/foreign-terrorist-organizations/.

Specially Designated Global Terrorists

Pursuant to the International Emergency Economic Powers Act, President George W. Bush issued an Executive Order 13224 (2001) sanctioning various individuals and entities as terrorists and authorizing the Secretary of State and the Secretary of the Treasury to make additional designations. OFAC implements the executive order under its Specially Designated Global Terrorists (SDGTs) program and maintains the names of SDGTs on its Specially Designated Nationals (SDN) List.

The Executive Order

President Trump's January 20, 2025 executive order states that it is "the policy of the United States to ensure the total elimination of these organizations' presence in the United States and their ability to threaten the territory, safety, and security of the United States through their extraterritorial command-and-control structures, thereby protecting the American people and the territorial integrity of the United States." The order provides that, within 14 days, the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, the Secretary of Homeland Security and the Director of National Intelligence, shall make a recommendation regarding the designation of any cartel or other organization as an FTO or a SDGT. Presumably, once such a recommendation is made, President Trump will consider what further action to take, including making the designations.

Analysis

Although prior administrations and members of Congress across the political spectrum have considered designating drug cartels as FTOs, they have not done so. Such a designation would expand the potential legal exposure of both U.S. and foreign businesses (and their executives) whose business operations may come into contact with designated cartels.

OFAC has sanctioned numerous drug cartels and associated companies and individuals, and accordingly placed their names on the SDN List. OFAC's power to sanction drug cartels stems primarily from its authorities under its Significant Narcotics Traffickers program (pursuant to Executive Order 12978) and its authority under the Kingpin Act.[5] These designations have included, among others, major Mexican cartels involved in manufacturing and trafficking fentanyl.[6] U.S. persons are prohibited from engaging in virtually all transactions with SDNs, and non-U.S. persons are generally prohibited from engaging in transactions with SDNs that involve a U.S. nexus, such as the processing of payments through the U.S. financial system.[7] U.S. and non-U.S. persons face the risk of civil and criminal penalties for violative transactions with SDNs. Moreover, as in other sanctions programs, non-U.S. persons who provide material support to SDNs are at risk of being sanctioned themselves and placed on the SDN List.[8]

Even if a cartel is already on the SDN List, an FTO designation—which has historically been reserved for terrorist organizations like Al-Qaeda, Boko Haram, Hezbollah, and the Islamic State—would further increase the legal risk to any person or entity that knowingly engages with the designated entity. Specifically, 18 U.S.C. § 2339B prohibits persons from knowingly providing material support or resources to a foreign terrorist organization, and from attempting or conspiring to do so. "Material support" includes any tangible or intangible property, including currency, financial services and other monetary instruments. The violator must know that the organization receiving material support is a designated terrorist organization, such as ISIS, but does not need to share the goals or beliefs of that organization.

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5 21 U.S.C. §§ 1901-1908 and 8 U.S.C. § 1182.

6 *See*, *e.g.*, *Treasury Sanctions Key Members of La Linea, a Group Involved in Trafficking Fentanyl into the United States*, UNITED STATES DEPARTMENT OF THE TREASURY (October 31, 2024), https://home.treasury.gov/news/press-releases/jy2704.

7 *BIS, OFAC, and DOJ Highlight That Sanctions and Export Controls Apply to Non-U.S. Companies and Individuals*, PAUL, WEISS CLIENT MEMORANDUM, March 12, 2024, https://www.paulweiss.com/practices/litigation/national-security-cfius-fara/publications/bis-ofac-and-doj-highlight-that-sanctions-and-export-controls-apply-to-non-us-companies-and-individuals?id=50638

8 Executive Order 14059 ("Imposing Sanctions on Foreign Persons Involved in the Global Illicit Drug Trade"), Section 1(b)(i).

While transactions with an SDN are only prohibited if they are conducted by U.S. persons or there is some other nexus to the United States, the material support statute has extraterritorial reach.[9] In effect, if a Mexican national who is an executive of a Mexican company knowingly directs the company to engage in dealings with a cartel that has been designated an FTO, she could potentially be charged with material support for terrorism if she later entered the United States on vacation. The implications of the broad definition of "material support," combined with the extraterritorial reach of the statute, are significant in light of the broad range of circumstances in which businesses operating in or with Mexico may encounter cartel activities. These can include making ransom or extortion payments or making payments to a company that a cartel owns.

The Department of Justice has previously charged companies with providing material support to terrorism if they knowingly make payments to FTOs. In 2007, Chiquita Brands International, Inc. pleaded guilty to material support for terrorism for making more than 100 "security payments" totaling over $1.7 million to the AUC, a Colombian paramilitary organization.[10] Chiquita agreed to pay a $25 million fine. In 2022, as we discussed in a prior client alert, French cement company Lafarge S.A. and its Syrian subsidiary pleaded guilty to material support for terrorism based on more than $6 million in payments to ISIS and another terrorist organization in exchange for protection and permission to operate a cement plant during the Syrian Civil War. Lafarge agreed to a $778 million fine.[11]

Separately, companies or individuals aid and abet or conspires with FTOs to commit acts of terrorism face potential civil liability. Under the Anti-Terrorism Act, "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."[12] 18 U.S.C. § 2333(a). Section 2333(c)(2) limits the reach of the statute to "an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act." Designation of cartels as foreign terrorist organizations could expose banks and other commercial counterparties to the risk of litigation under the Anti-Terrorism Act. [13]

At this stage, it is unclear what additional designations will result from this executive order. In the event of additional designations, U.S. and non-U.S. companies that are engaged in business dealings in Mexico and other countries where the designated organizations are operating, and whose business operations may come into contact with cartel activity, should consider conducting or refreshing a risk assessment to identify potential areas of interaction with cartels, and associated individuals and businesses. Companies should also consider reviewing their due diligence policies and procedures to ensure that they are well-designed to detect higher risk activities that may involve cartels. Financial services firms should consider a risk-based approach to any designations and apply appropriate diligence in business sectors that the designated cartels are known to operate in.

9 18 U.S.C.§ 2339B(d).

10 *Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay $25 Million Fine*, DEPARTMENT OF JUSTICE (March 19, 2007), https://www.justice.gov/archive/opa/pr/2007/March/07_nsd_161.html.

11 *Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations*, DEPARTMENT OF JUSTICE (October 18, 2022), https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations; *DOJ Brings First Terrorism Material Support Charge Against a Corporation, Underlining the Importance of Compliance When Operating in High-Risk Countries and of Robust M&A Due Diligence*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, October 20, 2022, https://paulweiss.com/practices/litigation/economic-sanctions-aml/publications/doj-brings-first-terrorism-material-support-charge-against-a-corporation?id=45105.

12 *Second Circuit Vacates and Remands Judgment Against Arab Bank in Antiterrorism Act Lawsuit*, PAUL, WEISS CLIENT MEMORANDUM, February 12, 2018, https://www.paulweiss.com/practices/litigation/economic-sanctions-aml/publications/second-circuit-vacates-and-remands-judgment-against-arab-bank-in-antiterrorism-act-lawsuit?id=25954.

13 *See, e.g. Linde v. Arab Bank PLC*, 882 F.3d 314 (2d Cir. 2018) (reversing jury verdict against bank for providing financial services to terrorists and remanding for further proceedings).

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January 28, 2025

Executive Orders Rolling Back DEI May Increase Activism Risk

Last week, the Trump administration issued two executive orders ending diversity, equity and inclusion ("DEI") policies within the federal government and mobilizing federal agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs and activities." The orders intensify the ongoing pushback against DEI initiatives within the private sector and may create new opportunities for activists (and not only those who oppose DEI) to leverage missteps to drive a wedge between management, the board, investors, employees, customers and other stakeholders.

Executive order "Ending Radical and Wasteful Government DEI Programs and Preferencing" terminates all DEI programs within the federal government. Specifically, the order requires the Director of the Office of Personnel Management and the Attorney General to review and revise all federal employment practices, union contracts and training policies to eliminate the consideration of DEI factors, goals, policies, mandates or requirements.

Executive order "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" directs all federal agencies to dismantle private-sector DEI preferences, mandates, policies, programs and activities. The order mobilizes federal agencies to, among other things, develop an action plan that identifies the "most egregious and discriminatory DEI practitioners in each sector of concern," "strategies to encourage the private sector to end illegal DEI discrimination and preferences" and avenues for litigation and regulatory intervention.

The past year has seen growing pushback against DEI initiatives at companies. With federal resources now being directed to support such efforts, companies—particularly government contractors and those operating in closely regulated industries—should expect heightened scrutiny of their employment practices and DEI-related programs. Risks that are not adequately addressed could result in material legal, reputational and financial repercussions and open the door to economic- and governance-driven activism. Companies would be well advised to consider immediate steps to mitigate the reputational, regulatory and enforcement risks arising from the latest executive orders. Such steps may encompass an evaluation of existing policies, commitments, disclosures and board oversight processes as well as assessing feedback from key stakeholders, including investors and employees.

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JANUARY 24, 2025

President Trump Issues Executive Orders Targeting DEI Programs and Gender Identity-Based Legal Protections

Through the use of Executive Orders, the Trump administration has taken swift and significant actions to eradicate the use of "illegal" diversity, equity and inclusion ("DEI") policies and practices by the federal government and to direct that federal agency enforcement authority be used to encourage the private sector to follow suit. Since his inauguration on January 20, 2025, President Trump has issued four executive orders related to the protection of "single-sex spaces and activities designed for women" and ending the use of "illegal DEI and DEIA policies" (the "Anti-DEI and Gender Orders"): (1) **Initial Rescissions of Harmful Executive Orders and Actions**;[1] (2) **Ending Radical and Wasteful Government DEI Programs and Preferencing**;[2] (3) **Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government**;[3] and (4) **Ending Illegal Discrimination and Restoring Merit-Based Opportunity**.[4] While the first two orders target, among other things, DEI efforts within the federal government, the other two orders have immediate implications for private companies and organizations. With respect to the private sector specifically, the Anti-DEI and Gender Orders:

- direct the Attorney General to "encourage the private sector to end illegal discrimination and preferences" by preparing a "proposed strategic enforcement plan," including identifying potential investigations, litigation and regulatory action;
- establish a federal policy promoting enforcement of "sex-protective" laws; and

1 On January 20, 2025, President Trump issued an executive order rescinding a number of previous executive orders described as "deeply unpopular, inflationary, illegal, and radical." This Order includes the rescission of Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government) and Executive Order 13988 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). *See* Exec. Off. of the President, Executive Order on Initial Rescissions of Harmful Executive Orders and Actions (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/.

2 Exec. Off. of the President, Executive Order on Ending Radical and Wasteful Government DEI Programs and Preferencing (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/.

3 Exec. Off. of the President, Executive Order on Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/.

4 Exec. Off. of the President, Executive Order on Ending Illegal Discrimination and Restoring Merit-Based Opportunity (Jan. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

- direct the termination of "equity-related" grants or contracts in the federal government and abolish affirmative action requirements for federal contractors.

New Executive Orders Relating to Sex Identification and DEI Measures

Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

The Gender Order states that it is now "the policy of the United States to recognize two sexes, male and female" and directs the Executive Branch to enforce "sex-protective" laws to promote this policy. The Order defines the term "sex" as an individual's "immutable biological classification" and directs the Secretary of Health and Human Services to provide "public clear guidance expanding on the sex-based definitions" in the Order. Looking ahead, the Gender Order directs the Attorney General and federal agencies to: (1) immediately issue guidance effectuating this new federal policy eliminating legal recognition and protections on the basis of transgender, nonbinary and intersex status; and (2) "prioritize investigations and litigation" to enforce the new policy.

Ending Illegal Discrimination and Restoring Merit-Based Opportunity

On January 20 and 21, 2025, President Trump signed a series of Executive Orders aimed at "enforcing civil-rights laws" and "ending illegal preferences and discrimination." Collectively, these Anti-DEI Orders require the termination of all DEI mandates, policies, programs, preferences, and activities in the Federal Government/federal contracting and direct the Attorney General to develop a plan for the use of regulatory investigations and litigation against private sector companies and organizations engaged in "illegal discrimination and preferences."

With respect to federal contractors, the Jan. 21 Order revokes Executive Order 11246, which required equal opportunity and nondiscrimination in government contracting, and directs the Office of Federal Contract Compliance Programs to stop "promoting diversity."[5] The Jan. 21 Order requires every government contract or grant award to "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws," and gives Federal contractors 90 days to come into compliance.

With respect to the private sector, the Jan. 21 Order directs the Attorney General to submit a report, within 120 days, containing recommendations to "encourage the private sector to end illegal discrimination and preferences, including DEI." The report must include a list of the "most egregious and discriminatory DEI practitioners in each sector of concern" and a plan to deter DEI programs or preferences, including identifying "up to nine potential civil compliance investigations" of "publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars." The Attorney General is encouraged to also consider "other strategies" directed at eradicating DEI in the private sector, including litigation and "regulatory action and sub-regulatory guidance." The Jan. 21 Order includes a carve-out for "contracting preferences for veterans of the U.S. armed forces."

Related Developments

On January 21, 2025, President Trump appointed Commissioner Andrea R. Lucas as Acting Chair of the EEOC. Appointed by President Trump during his first term, Commissioner Lucas has served on the EEOC since 2020.

In a press release, Commissioner Lucas stated that her priorities include:

> rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights,

5 Exec. Order No. 11,246, 3 C.F.R. 1964-1965.

> including women's rights to single-sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement.[6]

Following the Executive Orders, the three Democratic members of the EEOC, Charlotte Burrows, Jocelyn Samuels and Kalpana Kotagal, issued a joint statement defending DEI practices, stating

> Common sense practices, such as monitoring hiring and promotions decisions, skills-based hiring, standardized interview practices, and robust recruitment, remain lawful and important ways to promote the goals of our nation's laws and founding principles. These and other diversity, equity, inclusion and accessibility practices seek to include all workers according to their talents and abilities. … Barring adoption of these practices can only result in legal risk to employers and lost opportunities for vulnerable communities.[7]

The developments at the EEOC underscore the growing uncertainty employers face in ensuring compliance with anti-discrimination laws amidst a shifting legal landscape.

Potential Implications & Key Takeaways for Businesses

Although the Anti-DEI and Gender Orders do not require immediate action on the part of the private sector (other than federal contractors), businesses should expect increased scrutiny in the near term, including government-initiated investigations and litigation, of their DEI policies and practices. To mitigate against these growing risks, businesses and other private employers may wish to:

- Review their DEI policies and programs as soon as practicable to ensure they are effectively addressing the risk of impending investigations and litigation directed at the private sector. Programs which provide a tangible employment or other benefit on the basis of race or another protected category should be highest priority for review. Programs which promote equal opportunity for all with respect to hiring, promotion and compensation, such as robust recruitment, standardized interview practices, addressing implicit bias, and monitoring hiring, promotion and compensation decisions remain essential to ensuring compliance with anti-discrimination laws.

- Federal government contractors with affirmative action programs related to race or sex should review their programs forthwith to ensure that they "[do] not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." Compliance is required by April 21, 2025.

- Review their gender identity-based policies and practices to ensure compliance as new guidance from federal agencies and the courts effectuating and interpreting the Gender Order is issued. Employers with policies and practices prohibiting discrimination and harassment and encouraging an inclusive workplace, including on the basis of gender identity, transgender status and/or nonbinary status, may continue to remind employees of those protections and measures, as well as their commitment to a safe, respectful and inclusive workplace.

- Consider whether and how they may wish to address these developments with employees, board members, investors, clients, vendors and other stakeholders.

- Seek legal guidance to ensure that corporate disclosures that reference company DEI programs do so in a manner that indicates compliance with applicable laws.

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6 Press Release, U.S. Equal Emp. Opportunity Comm'n, President Appoints Andrea R. Lucas EEOC Acting Chair (Jan. 21, 2025), https://www.eeoc.gov/newsroom/president-appoints-andrea-r-lucas-eeoc-acting-chair.

7 @JSamuelsEEOC, Twitter (Jan. 21, 2025, 4:33 PM), https://x.com/JSamuelsEEOC/status/1881817519188795700.

- Closely monitor regulatory and legislative developments, conduct regular audits of their anti-discrimination policies and seek guidance on mitigating legal risks.

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Paul | Weiss

CLIENT MEMORANDUM

January 24, 2025

Update on Transition at the U.S. Antitrust Agencies

- In the last few weeks, the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) engaged in what is likely an unprecedented level of end-of-term activity.

- On Monday afternoon, the Trump administration began governing with a series of executive actions that have started to shape antitrust enforcement going forward.

Antitrust Enforcement at the Beginning of the Trump Administration

As of January 20, 2025, both the FTC and DOJ are under new leadership.

Department of Justice

The President directed that James McHenry, a career DOJ immigration lawyer, "perform the functions and duties of the [Attorney General] in an acting capacity until the position is filled by appointment."

Last week a Senate committee held a hearing on the nomination of Pam Bondi to be Attorney General. A committee vote is expected next week, with a floor vote in the Senate likely soon after. Asked at her hearing about whether she would continue to prosecute the DOJ's pending monopolization cases, Ms. Bondi testified that she has not "looked at those [cases] on a case-by-case basis, but [is] committed to that type of case and [to] protecting consumers." She added that she "will look at" those cases along with Antitrust Division officials "right away" and at several points praised Abigail Slater, the nominee to head the Division.

The President formally nominated Ms. Slater to lead the Antitrust Division on Monday. Over the last 20 years, the time from nomination to confirmation for the Assistant Attorney General for Antitrust has ranged from less than two months to nearly 11 months. A reasonable estimate based on the central tendency of historical data from the last 20 years is that Ms. Slater's confirmation process could take approximately five months. However, we expect that given Ms. Slater's apparent widespread support, the time from her nomination to confirmation will likely be shorter.

In the meantime, Omeed Assefi, who joined the Antitrust Division as a criminal prosecutor sometime last year, has reportedly been named to serve as acting assistant attorney general. Mr. Assefi was previously an assistant United States attorney in the District of Columbia and served in the White House and at the DOJ Civil Rights Division during the first Trump administration.

Federal Trade Commission

President Trump designated Commissioner Andrew Ferguson to be Chairman of the FTC on January 20. It is the Chairman's prerogative, subject to the approval of the Commission, to appoint bureau directors and he has appointed Susan Musser to be Acting Director of the Bureau of Competition. Ms. Musser is Chief Trial Counsel in the bureau and has been at the FTC since 2020. Prior to that, she was in private practice and was a Trial Attorney at the DOJ.

According to a January 24 report by Leah Nylen and Josh Sisco for Bloomberg Law, Chairman Ferguson has chosen Daniel Guarnera to be Director of the FTC Bureau of Competition. Mr. Guarnera currently is the Section Chief of the Civil Conduct Task Force in the Antitrust Division of the DOJ. In this role his focus is on civil non-merger matters, including the DOJ's tech monopolization matters. (Coincidentally Chairman Ferguson was also involved in one of these cases in his prior role as Solicitor General of the Commonwealth of Virginia, which joined with the DOJ and other state attorneys general in bringing the lawsuit.) Prior to the civil task force, Mr. Guarnera was counsel to former Assistant Attorney General Makan Delrahim, who led the Antitrust Division in the first Trump administration.

The President formally nominated Mark Meador to be a commissioner of the FTC. Over the past 20 years, the time from nomination to confirmation of an FTC commissioner has ranged from several weeks to over a year. A reasonable estimate based on the central tendency of historical data is that Mr. Meador's confirmation process will take approximately three and a half to four months.

Commissioner Khan announced that she will leave the FTC "by January 31." Until then, the Democrats will maintain a voting majority. After her departure, there will be a period of time when the Commission has the potential to deadlock, with two Republican commissioners and two Democratic commissioners. This could, in certain instances, prevent the FTC from accepting a consent order settlement, for example—at least for as long as the deadlock persists.

A press release issued by the FTC on January 22 stated that "Chairman Ferguson has taken [several] actions to protect the FTC's employees and the American people from DEI," including closing the FTC's Office of Workplace Inclusivity and Opportunity and placing "all employees within that office on administrative leave." According to another press release: "The Federal Trade Commission approved a motion to give Chairman Andrew N. Ferguson authority needed to comply with President Trump's executive orders ending DEI across the federal government." The vote to approve was 2-1-2, with Commissioner Bedoya voting no and Commissioners Slaughter and Khan not participating.

Executive Actions

Executive Order on Ending the Weaponization of the Federal Government. The President has directed that insofar as it is consistent with applicable law and "subject to the availability of appropriations," the "Attorney General, in consultation with the" Chairman of the FTC, "shall take appropriate action to review the activities of . . . the Federal Trade Commission, over the last 4 years and identify any instances where [the FTC's] conduct appears to have been contrary to the purposes and policies of this order, and prepare a report to be submitted to the President . . . with recommendations for appropriate remedial actions to be taken to fulfill the purposes and policies of this order."

The "purposes and policies" of the order relate to ending the alleged "weaponization of government," i.e., actions that "appear oriented more toward inflicting political pain than toward pursuing actual justice or legitimate governmental objectives."

Memorandum on Regulatory Freeze Pending Review. The President has also ordered all executive departments and agencies to, among other things, "consider postponing for 60 days from the date of this memorandum the effective date for any rules that have been published in the *Federal Register* . . . for the purpose of reviewing any questions of fact, law, and policy that the rules may raise" insofar as this is "consistent with applicable law." It remains to be seen whether this directive will have any effect on the pending HSR rules, which have been published and are set to become effective on February 10, 2025, unless postponed. It also remains to be seen whether the FTC under Chairman Ferguson will postpone the effective date of the new HSR rules under section 705 of the Administrative Procedure Act while a legal challenge seeking to set aside the rules is pending.

Executive Order on Initial Rescissions of Harmful Executive Orders and Actions. The President also issued an executive order rescinding a lengthy list of prior executive orders. President Biden's Executive Order on Promoting Competition in the American Economy was *not* included.

Actions Taken at the End of the Biden Administration

The antitrust agencies engaged in a flurry of activity at the end of the Biden administration. Some of these actions, such as concluding open enforcement matters, are fairly characterized as routine law enforcement activity. However, the agencies also commenced several enforcement actions in court and issued policy guidance within days of the transfer of responsibility for antitrust enforcement.

Resolution of Matters on Consent

- *Gun Jumping Complaint*. On January 7, 2025, the DOJ obtained a record $5.6 million civil penalty from oil companies accused of violating pre-merger "gun-jumping" prohibitions. The DOJ alleged that interim operating covenants in the purchase agreement giving the buyer approval rights on expenditures over $250,000 had the effect of giving the buyer control over certain ordinary course business decisions. According to the DOJ, this and other instances of pre-merger coordination between the buyer and target allowed the buyer to obtain beneficial ownership of the target company's business before the expiration waiting period required by the HSR Act.

- *Merger Challenge*. On January 17, 2025, the FTC alleged that a private equity firm was involved in "anticompetitive acquisitions to suppress competition and drive up prices for anesthesiology services across Texas." In a settlement announced at the same time, the firm agreed to limit its ownership of the portfolio company, reduce its board representation to one seat and to notify the FTC of and obtain prior approval for certain future transactions. The FTC characterized this as an "antitrust roll-up scheme case" in line with the 2023 Merger Guidelines. Then-Commissioner (now Chairman) Andrew Ferguson took issue with this characterization, explaining in a concurring statement joined by Commissioner Holyoak that the Clayton Act does not prohibit roll-ups, it prohibits anticompetitive "'acqui[sitions]' . . . which is what the complaint here alleged."

- *Criminal Matters*. In addition, the DOJ in recent days announced several guilty pleas in connection with information technology, commercial roofing and asphalt bid rigging conspiracies.

New enforcement actions in active litigation

In the weeks leading up to January 20, the DOJ initiated three new enforcement actions:

- *Section 1 Conduct Complaint.* On January 7, 2025, DOJ sued six landlords for violating section 1 of Sherman Act by allegedly participating in an "algorithmic pricing scheme" involving the sharing of competitively sensitive information. The new defendants were added in an amended complaint filed in a civil enforcement action that has been pending in the Middle District of North Carolina since August 23, 2024.

- *Merger Challenge.* On January 10, 2025, DOJ sued to enjoin the acquisition of CWT Holdings by Amex Global Business Travel Group.

- *HSR Enforcement Action.* On January 14, 2025, the DOJ sued a private equity firm for alleged HSR Act violations.

The FTC initiated two new enforcement actions:

- *FTC Section 2 Conduct Action.* On January 15, 2025, the FTC sued Deere & Company in federal court for violating section 2 of the Sherman Act by illegally monopolizing an alleged market for "restricted repairs for Deere Large Tractors and Combines" and violating section 5 of the FTC Act by illegally leveraging its alleged monopoly power in a market for "Fully Functional Repair Tools to harm competitive conditions in the market for restricted repairs for Deere Large Tractors and Combines." According to the dissenting commissioners' statement, the defendant and FTC staff were in "active negotiations over a fix" to resolve the matter on consent.

- *Another Robinson-Patman Act Enforcement Action.* On January 17, 2025, the FTC sued PepsiCo for violating the Robinson Patman Act. The vote was 3-2. According to the FTC, PepsiCo "has engaged in illegal price discrimination by providing one customer—a large, big box retailer—with unfair pricing advantages, while raising prices for competing retailers and customers." The two Republican dissenting commissioners argued that the complaint is unsupported by facts and questioned the timing. Commissioner Holyoak wrote that this is "the worst case I have seen in my time at the Commission." The complaint, she said, is "wholly deficient," "fail[s] to state a claim" and was "rushed . . . out the door" without "evidence to support the allegations." Chairman Ferguson's statement was similarly critical.

Under the Federal Rules of Civil Procedure, a plaintiff may voluntarily dismiss an action by filing a notice of dismissal at any time before the answer or a motion for summary judgment is filed by the defendant or at any time by filing "a stipulation of dismissal signed by all parties who have appeared." This raises the possibility that the new agency leadership could direct agency lawyers to dismiss any of these complaints or to reach a settlement with defendants. We know nothing of incoming DOJ officials' views on the strength of any of the DOJ complaints. However, the strong dissenting statements of Chairman Ferguson and Commissioner Holyoak in the FTC's PepsiCo matter suggest that, if there were a third vote, the Commission might agree to dismiss the action or perhaps agree to a settlement. As a general matter, while settlement of antitrust matters was disfavored—especially at the DOJ—during the prior administration, it may be that new majority will be more amenable to compromise.

Issuance of Guidance Documents on Labor Antitrust Issues

Throughout the Biden administration, the DOJ and FTC withdrew antitrust guidance documents and policy statements that, in many cases, antitrust counsellors had referenced for years, on topics such as: unfair methods of competition enforcement (later replaced), vertical mergers (later replaced), bank mergers, standards-essential patents, collaboration with competitors and information sharing. It was somewhat surprising, then, to see the agencies issue three guidance and policy documents. All three relate to labor issues.

FTC Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability. On January 14, 2025, the FTC also issued a rather lengthy enforcement policy statement on gig workers and the antitrust labor exemption. The statement concludes that "the Commission [at the time the statement was issued] believes that workers who provide labor services are not subject to antitrust liability when engaging in protected collective action—such as seeking better compensation and job conditions—even if the firm whose labor practices the workers seek to improve classifies (or misclassifies) them as independent contractors." The FTC vote to approve the guidance was 3-2, with the Republican commissioners voting no.

DOJ and OSHA Statement on Non-Disclosure Agreements That Deter Reporting of Antitrust Crimes. In a January 14, 2025 press release, the DOJ along with OSHA "jointly affirmed that corporate non-disclosure agreements (NDAs) that deter individuals from reporting antitrust crimes undermine the goals of whistleblower protection laws, including the Criminal Antitrust Anti-Retaliation Act of 2019 (CAARA)." The DOJ noted that "NDAs that undermine CAARA or otherwise interfere with employees' freedom to report potential crime will cost the employer when the Antitrust Division makes its charging decisions and sentencing recommendations," and could also have consequences for a company's ability to qualify for leniency from the Antitrust Division.

DOJ and FTC Antitrust Guidelines for Business Practices Affecting Workers. These guidelines, issued on January 16, 2025, replace 2016 Antitrust Guidelines for Human Resource Professionals issued in October 2016 at the end of the Obama administration. They cover topics such as wage-fixing and no-poach agreements, franchise no-poach agreements, exchange of compensation information, non-competes, provisions in training-repayment agreements, non-solicitation agreements and exit fee/liquidated damages provisions.

The guidelines are "intended to promote clarity and transparency for the public about how the Agencies identify and assess business practices affecting workers that may violate the antitrust laws." The timing of the release of these guidelines casts some doubt on their utility going forward (will the new administration use the same approach to analyzing these practices?). Nevertheless, they, like the 2023 Merger Guidelines, cite case law and are therefore at least useful as a starting point for research into questions related to the topics they cover. The FTC vote to approve the guidance was 3-2, with the Republican commissioners voting no.

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Potential Merger Enforcement Changes in the Trump Administration

With the change of administrations in January 2025, antitrust enforcement priorities are likely to shift next year. We expect the Antitrust Division of the Department of Justice (DOJ) and Federal Trade Commission (FTC) in the Trump Administration to continue to enforce the antitrust laws aggressively, while de-emphasizing some of the more novel antitrust theories pursued by the Biden DOJ and FTC, marking a return to a more traditional antitrust analysis. We anticipate that the DOJ and FTC will continue to closely investigate horizontal consolidations, but will be more likely to approve vertical transactions and less likely to focus on theories such as potential harm to labor markets.

We expect the following changes in the incoming Trump Administration:

- Curtailment or revision of the 2023 Merger Guidelines, which represented a significant departure from previous agency guidelines and set forth an expansive framework for merger enforcement
- Less burdensome and more focused Second Requests, likely resulting in shorter investigations
- Greater willingness to accept structural remedies (i.e., divestitures) in lieu of litigating merger challenges
- A return to only limited use of "prior approval" provisions in FTC consent decrees, meaning that parties that become subject to decrees would normally only need to notify the FTC of certain future transactions rather than receive the FTC's permission to engage in such transactions
- Less emphasis on proactively investigating interlocking directorates

Agency Leadership

The next Assistant Attorney General (AAG) of the Antitrust Division of the DOJ and the next Chairman of the FTC have not yet been publicly announced. Regardless of who takes over leadership of the agencies, we expect continued aggressive enforcement of the antitrust laws.

The Antitrust Division is run by an AAG who is nominated by the President and confirmed by the Senate, a process that historically has taken between two to 10 months following the inauguration. Given Republican control of the Senate, we expect new leadership could be in place by the Spring of 2025. In the interim, an Acting AAG will be appointed by the incoming administration at some point after Inauguration Day to run the Antitrust Division until the Senate confirms the President's nominee.

The FTC has five Commissioners who are nominated by the President and confirmed by the Senate for staggered seven-year terms. A maximum of three can be from the same political party. The President designates one Commissioner as Chairman. The Chairman sets the strategic policy and enforcement goals of the FTC and is responsible for running the agency on a day-to-day basis. Chair Lina M. Khan's term expired in September but she can remain as a Commissioner until a successor receives Senate confirmation, which we expect will happen by around April 2025. After Inauguration Day, we expect one of the sitting Republican Commissioners would be designated as Acting Chair pending confirmation of a third Republican Commissioner. The upshot is that until a new Republican Commissioner is confirmed or one of the Democratic Commissioners resigns, for the foreseeable future, we expect continued aggressive enforcement by the FTC as the three sitting Democratic Commissioners will continue to have the ability to vote to clear or block transactions.

Substantive and Procedural Aspects of Merger Enforcement

Biden-Era Merger Guidelines May be Withdrawn or Curtailed

In line with Republican Commissioners' statements, we expect the FTC and DOJ to withdraw or curtail the 2023 Merger Guidelines. The guidelines are intended to set forth the framework that the agencies follow when reviewing transactions. The current guidelines represent a stark departure from prior enforcement principles and reflect the Biden Administration's aggressive antitrust enforcement agenda by significantly lowering the thresholds at which the agencies presume a merger to be illegal and by introducing novel and untested legal theories they might use as a basis to challenge a merger.

We expect the new administration to modify the guidelines with regard to several issues:

- **Structural emphasis.** According to the 2023 Guidelines, the agencies presume that mergers that result in a combined share of 30% or more in a relevant market are illegal. Prior administrations considered such concentration statistics relevant, but not dispositive. We believe that the agencies in the new administration will deemphasize the structural presumptions set forth in the 2023 Guidelines and return to a mode of analysis that requires the agencies to conduct a fact-based assessment to determine whether the effect of a merger "may be substantially to lessen competition." Additionally, we expect the new administration will rely more on economic analysis in considering whether a transaction raises competitive concerns. The 2023 Guidelines minimized the importance of economic analysis in merger review.

- **Vertical mergers.** The 2023 Merger Guidelines, in another significant departure from prior agency guidance, do not credit vertical mergers as presumptively pro-competitive and discount the importance of efficiencies stemming from vertical mergers, such as the elimination of double marginalization. We expect the new administration will restore the presumption that vertical mergers are pro-competitive.

- **Labor issues.** The 2023 Guidelines emphasize that the agencies consider potential harm to labor markets when analyzing whether transactions raise competitive concerns. We expect the next administration will deemphasize this issue, and focus on potential labor market harm when a merger combines two entities that employ a significant percentage of uniquely-skilled workers who are not otherwise available on the market to competitors.

New and Expansive HSR Form Rules Have Staying Power

Last month, the FTC issued changes to rules under the Hart-Scott-Rodino (HSR) Act that will overhaul premerger notification filing requirements. The new requirements are set to become effective on February 10, 2025, and are expected to substantially increase the burden, time and expense required to complete HSR notifications for all filers—and in particular private equity buyers. The Commission vote to issue the rules was 5-0 and we expect the rules will remain in place even with a change of administration, although FTC informal guidance interpreting their application might take a more pragmatic approach than under the Biden Administration. The new rules might face legal challenges that could delay their implementation; though as far as we are aware, no challenge has been filed to date.

In exchange for agreeing to vote for the new rules, the Republican Commissioners required the HSR waiting period early termination regime (which had been "temporarily" suspended in February 2021) to be reinstated. We expect that the FTC will reinstitute early termination in February 2025 when the new HSR rules are set to go into effect and we believe that the agencies will begin regularly granting early termination again for transactions that clearly raise no competitive concerns. It remains to be seen whether the FTC will grant early terminations at the frequency it did prior to the 2021 suspension.

Less Burdensome Second Request Compliance Obligations
Second Requests themselves may become less onerous. Under the Biden Administration, the agencies added nonstandard specifications and implemented process changes to an already burdensome process. By contrast, a goal of the prior Trump-era Antitrust Division was to reduce the burden on parties receiving Second Requests by implementing several reforms to presumptively limit the volume of documents and number of depositions, with an aim to complete Second Request investigations within six months. This was driven by an observation by the then-head of the Antitrust Division that "[d]elay is a form of uncertainty and risk, [which the agency] should seek to remove . . . from the merger-review process whenever possible."

Fewer Litigation Challenges to Mergers and More Merger Settlements Expected
The number of merger challenges litigated in federal courts or in administrative proceedings at the FTC will likely drop, in part as a result of a greater willingness to resolve cases with divestitures.

Traditionally—and during the prior Trump Administration—the agencies have accepted structural remedies (i.e., divestitures of assets or business units) to address competition concerns. Under the Biden Administration, however, ideology and resources were focused on litigating rather than settling cases and there are scant examples of the DOJ or FTC agreeing to any consent decrees in the past four years. This approach also led to more signed deals being abandoned in the face of protracted review and potential litigation: 20 deals were abandoned under Biden versus six under the prior Trump Administration.

The next administration will likely be more amenable to settling complex merger investigations than the current one, and is less likely to cultivate an enforcement regime that will compel parties to abandon transactions at the pace we observed during the Biden Administration. In addition, the next administration may reinstate the DOJ Merger Remedies Manual that was revised under the prior Trump Administration.

More Favorable View of Vertical Mergers
While the DOJ in the Trump Administration brought the first vertical merger challenge in federal district court in roughly 40 years, ultimately losing at the District Court and Court of Appeals, overall the Trump Administration viewed vertical mergers more favorably than the Biden Administration has. Under Biden, the FTC aggressively pursued challenges to vertical transactions, including suing to block Illumina's acquisition of Grail, and Microsoft's acquisition of Activision. This approach to vertical transactions—and the wider policy of pursuing expansive theories of harm—have been met with mixed reception by federal courts, who ultimately adjudicate merger challenges. (The FTC lost the Microsoft case and has appealed.) We expect the new Trump Administration to have a greater willingness to recognize the economic efficiencies that a vertical merger can bring.

Private Equity Likely to be Viewed Less Skeptically
The Biden Administration has approached private equity with skepticism, increasing scrutiny of so-called serial acquisitions and expressing skepticism about the fitness of private equity-funded divestiture buyers. The next administration is likely to take a less suspicious approach towards private equity and focus enforcement only on transactions that potentially raise issues under traditional theories of harm, whether or not they are conducted by financial or strategic buyers. Indeed, the DOJ Merger Remedies Manual under the prior Trump Administration generally treated strategic and financial buyers neutrally, and in some cases even indicated a preference for private equity buyers, stating that "in some cases funding from private equity and other investment firms [is] important to the success of the remedy because the purchaser [has] flexibility in investment strategy, [is] committed to the divestiture, and [is] willing to invest more when necessary."

Return to Limited Use of Prior Approval Provisions in FTC Consent Orders
Prior approval provisions in FTC orders require parties to obtain FTC permission before entering into transactions covered by the provision. For decades, the FTC limited the use of these provisions to narrow situations where it believed that parties to mergers the FTC found to be anticompetitive would "attempt the same or approximately the same merger" with "essentially the same relevant assets." In 2021, the FTC announced that it would expand the use of prior approval provisions to include any future transactions involving the same relevant market; any re-sale of assets acquired by a divestiture purchaser as part of a merger remedy; and, in certain circumstances, future transactions involving different relevant markets. This prior approval regime is

separate from the requirement to notify a transaction under the HSR Act and is not subject to the same statutory controls over timeline or process. In practice, merging parties operating under consent decrees could face indefinite, lengthy reviews and uncertainty. We expect the FTC in the Trump Administration to return to only limited use of prior approval provisions and instead require only prior notice for covered transactions.

Active Enforcement of Interlocking Directorates Likely to be Deprioritized

The DOJ and FTC under the Biden Administration have dedicated significant resources to enforcement of Section 8 of the Clayton Act, which prohibits interlocking directorates. The agencies under the Biden Administration have taken a more aggressive stance toward Section 8 enforcement by actively looking for potential interlocks and requiring resignations to cure purported violations. We anticipate that the incoming administration may dedicate fewer resources to investigations broadly searching for potential Section 8 violations, though we note that the new HSR rules require significant disclosures from directors and officers meant to identify potential Section 8 concerns.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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