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THE JOURNAL OF FEDERAL AGENCY ACTION

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Editor's Note

Chevron

Victoria Prussen Spears*

Chevron deference, announced by the U.S. Supreme Court in 1984, gives federal agencies wide latitude to define their own statutory authority. As discussed in the lead article of this issue of *The Journal of Federal Agency Action*, the Court now has agreed to decide whether to overturn or to limit *Chevron* deference.

Read that article for background on *Chevron* and the potential implications of the Court's upcoming decision, and then read the other articles that we are proud to publish here.

Chevron

As just noted, the first article in this issue is on *Chevron* deference. In this article, titled "The Supreme Court Decides to Revisit *Chevron*: Here's What It Could Mean for Future Deference to U.S. Government Agency Interpretations," Ryan J. Strasser and Timothy L. McHugh of Troutman Pepper Hamilton Sanders LLP explain that the U.S. Supreme Court has agreed to decide whether to overturn or to limit *Chevron* deference.

Significantly, they also observe that a decision by the Court to overrule or to limit *Chevron* would, in their words, "constitute a watershed decision in administrative law."

A Regulatory Hurdle

Eric McClafferty, Matthew C. Luzadder, Alla M. Taher, and Jeffrey Hunter of Kelley Drye & Warren LLP follow with their piece, titled "Before Acquiring a U.S. Company, Do Not Forget to Consider This Important Regulatory Hurdle."

Here, the authors explain that when a non-U.S. company acquires a U.S. company, the acquisition may need to be reviewed by the U.S. Committee on Foreign Investment in the United States.

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The H-1B Lottery

Morgan Bailey, Maximillian L. Del Rey, and Kelly B. Kramer of Mayer Brown are the authors of "U.S. Department of Homeland Security Launches Fraud Investigations into Dozens of Companies for H-1B Lottery Abuse."

In this article, the authors discuss a recent initiative by the U.S. Department of Homeland Security to determine whether employers are inappropriately gaming the H-1B lottery system.

The EPA

Matt Ahrens, Allison Sloto, Allan T. Marks, and Thomas D. Goslin of Milbank LLP follow with "Proposed Environmental Protection Agency Carbon Pollution Standards Would Impact Energy Sector."

In this article, the authors examine the Environmental Protection Agency's proposed greenhouse gas emission standards for new and existing fossil fuel–burning power plants.

Three Departments

Our next article is titled "Get Ready to Attest: Three U.S. Departments Release 'Further Guidance' on Gag Clause Prohibitions." The authors, Laura L. Ferguson and Aaron M. Weiss of Locke Lord LLP, briefly summarize the rules relating to the Gag Clause Laws found in Part 57 of the Affordable Care Act Frequently Asked Questions and suggest next steps for employer plan sponsors.

The FDA

In "Food and Drug Administration Publishes Draft Recommendations on Use of Dietary Guidance Statements," Miriam Guggenheim, Jessica O'Connell, and Deepti Kulkarni of Covington & Burling LLP discuss a recent draft guidance published by the Food and Drug Administration on the use of dietary guidance statements in conventional food labeling.

Meme Stock Events

Gabriel Benincasa, a corporate attorney with more than 20 years of experience in senior leadership roles in legal, risk, and compliance in the financial sector, served as the first chief risk officer for the U.S. Securities and Exchange Commission. He is the author of the next article in this issue, "Meme Stock Events: An Analysis of the Securities and Exchange Commission and House Financial Services Committee Reports," in which he discusses reports from the Securities and Exchange Commission and the House Financial Services Committee on recent meme stock events.

In Latin America

Manuel (Manny) A. Abascal, Daniel J. Dominguez, Katherine A. Sawyer, and Lucas Fontes Novaes of Latham & Watkins are the authors of "Latin America Likely to Face Continued Robust U.S. Anticorruption Enforcement." Here, the authors explain that companies operating in Latin America should reexamine anticorruption best practices and be prepared to act quickly in response to a U.S. government inquiry.

Enjoy the issue!

Note

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The Supreme Court Decides to Revisit *Chevron*: Here's What It Could Mean for Future Deference to U.S. Government Agency Interpretations

Ryan J. Strasser and Timothy L. McHugh*

In this article, the authors explain that the U.S. Supreme Court has agreed to decide whether to overturn or limit Chevron *deference, and that a decision by the Court to overrule or to limit* Chevron *"would constitute a watershed decision in administrative law."*

Chevron deference, announced by the U.S. Supreme Court in 1984, is a judge-made doctrine that generally requires a federal court when reviewing federal agency action to defer to the agency's reasonable interpretation of an ambiguous statute.[1] It rests on the presumption that in many circumstances, "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[2] Practically speaking, the doctrine gives agencies wide latitude to define their own statutory authority, frustrating the ability of businesses, organizations, and individuals to successfully challenge agency action in the courts.

For these and other important reasons, the doctrine has come under intense scrutiny in recent years on statutory and constitutional grounds from individual justices of the Supreme Court, federal judges in lower courts, and academics.

To date, however, the Court has avoided the question of whether to overrule the *Chevron* doctrine altogether, going so far as to ignore it in recent administrative law cases. That may soon change.

On May 1, 2023, the Court granted review in *Loper Bright Enterprises v. Raimondo*, No. 22-451, on the sole question of whether to overturn or limit *Chevron* deference. The Court overruling or limiting *Chevron* would constitute a watershed decision in administrative law.

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This article examines the import of the Court's review of the *Chevron* doctrine in three parts.

In the first section, this article briefly discusses the history of judicial review of federal agency action and the emergence of the *Chevron* doctrine.

In the second section, it identifies several of the most-pointed criticisms that have been lodged against the doctrine, from the likes of then-Judge Gorsuch, among others.

In the next section, this article explores *Loper Bright*—the vehicle the Court has chosen for review of the *Chevron* doctrine—and the question presented in that case.

This article then concludes with some predications about the practical implications of a potential change or abandonment of the *Chevron* doctrine on a go-forward basis.

The History of Judicial Review of Agency Action and the *Chevron* Doctrine

Judicial Review Before the Administrative Procedure Act

Before the New Deal and the rise of the administrative state, Article III courts used traditional sources of statutory interpretation and policy assessments to create a body of judge-made regulatory principles that applied equally to the executive branch. During this period, Article III courts would generally defer to a statute's interpretation if it was in line with long-standing interpretations of the statute; that is, if the interpretation was "customary" or announced "contempora[neous]" with the enactment of the statute.[3] The New Deal ushered in a new era in the administration of federal laws and, in doing so, created a conflict regarding the deference that should be afforded to executive agency interpretation of agency-administered statutes.

The deference Article III courts afforded executive interpretation of federal statutes between the New Deal era and the Supreme Court's watershed decision in *Chevron* cannot be described as a coherent doctrine. Rather, between the rise of the administrative state and the mid-1980s, courts considered various factors in assessing the level of deference to be afforded to agency interpretations. The question was one of degree. The more factors leaning in favor of deference, the greater the deference afforded. The fewer factors

in favor of deference, the lesser the deference afforded. The most important considerations during this period were the degree of deference Congress intended courts to give the agency, the expertise of the agency to interpret certain statutes, and Congress' explicit or implicit consent to agency interpretation.[4]

One of the most noteworthy Supreme Court decisions from this era regarding judicial deference to agency interpretation solidified the judiciary's multifactor consideration approach in 1944. *Skidmore v. Swift & Company* held that the level of deference due to agency interpretation was dependent on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[5] The Court's decision in *Skidmore* reflects the highly flexible nature of the doctrine at this point. Not only were the factors considered manipulable, the weight those factors were given was also mutable. The judiciary's multifactor approach during this period was thus marked with extreme uncertainty regarding the level of deference due to agency interpretations.

Judicial Review After the Administrative Procedure Act

As the Court struggled to determine the correct level of judicial deference due to agency interpretation, Congress also debated the question. This debate culminated in the enactment of the Administrative Procedure Act (APA) in 1946. Section 706 of the APA provides that a "reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[6] The full meaning of this language is understood through an analysis of pre-APA cases because the language of the APA was tailored to the case law that preceded it.[7] In fact, many scholars now agree that Section 706 of the APA merely codified the existing case law on judicial deference up until that point.[8] In part, that is because the APA codified the standard of reviewing statutory interpretations as still *de novo* while still permitting a reviewing court to defer to an agency's interpretation if the traditional canons of statutory interpretation counseled in favor of doing so.[9] This doctrine prevailed until 1984.

The Emergence of the *Chevron* Doctrine

Virtually no one believed that the Supreme Court would reconsider the level of deference to be applied to agency interpretation of ambiguities in federal statutes administered by the agency when it decided *Chevron* in 1984. But that is just what the Court did. The case considered whether the Environmental Protection Agency could permissibly define a "stationary source of air pollution" to include power plants containing multiple pollution-emitting devices under the Clean Air Act. Such a definition would empower state governments to allow plants with multiple emitting devices to add new emitting devices or modify existing emitting devices without obtaining a permit, so long as the alteration did not increase total emissions.[10]

Instead of considering the case on the merits, Justice Stevens, writing for a unanimous majority, established *Chevron*'s now-famous two-step process for determining when, if at all, reviewing courts should defer to agency interpretations. The first step of the framework instructs courts to determine initially whether Congress has explicitly provided its unambiguous intent on the provision at hand, based on the plain language of the statute and the traditional tools of statutory construction. If it has not, the court can then deem the statute ambiguous and next must consider whether the agency's interpretation is reasonable. If the agency's interpretation is reasonable, it is entitled to deference. Applying this framework in the *Chevron* case itself, the Court ultimately deferred to the EPA's interpretation because Congress had been sufficiently ambiguous by not defining the term, and the agency's interpretation was reasonable given the context of the case.[11]

The holding in *Chevron* revolutionized the doctrine of judicial deference. Before *Chevron*, courts had balanced competing factors to determine whether an agency interpretation should receive some sort of deference. But after *Chevron*, the deference issue is no longer one of degree. Rather, *Chevron* provided a definitive framework that required the courts to afford maximum deference to agency interpretation if Congress had assigned the responsibility to the agency by being ambiguous and the agency acted reasonably in rendering its interpretation.[12]

Chevron Becomes Dominant in Judicial Review

For a few years after the announcement of the *Chevron* decision, however, not much changed about judicial review. From 1984 to

1990, the Supreme Court heard 90 cases involving the question of deference to a federal agency's statutory interpretation. Yet only 36% of these cases addressed *Chevron* at all.[13] Thomas Merrill argues that the Supreme Court's irregular use of the doctrine during this period is attributable to the Court's reluctance at that time to firmly support or abandon the *Chevron* framework.[14] The Court's holding that *Chevron* deference can only be afforded to agency interpretation in mixed questions of law and fact in *Immigration and Naturalization Service v. Cardoza-Fonseca* supports this hypothesis because it seems to directly contradict the holding in *Chevron*.[15] It was statements like this one from the Court in the early post-*Chevron* years that arguably caused some uncertainty in the lower courts and slowed the doctrine's roots from taking hold in administrative law. But, by the next term, both the Supreme Court and the lower courts began applying *Chevron* to pure questions of law as haphazardly as they had done before.[16]

Nevertheless, since roughly 1990, the *Chevron* doctrine has established itself as the dominant doctrine of judicial review of agency statutory interpretations, at least in the lower courts. As one commentator has put it, *Chevron*'s influence is of such paramount importance "because it crystallized a central question in administrative law—when courts would defer to agency interpretations of statutes, replacing fuzzy, multifactor standards with rule-like clarity, at least in a broad swath of cases."[17] Indeed, none other than Cass Sunstein declared the doctrine a "counter-*Marbury*, for the administrative state."[18]

Criticism of *Chevron*

It is perhaps no surprise given the early scholarly recognition of *Chevron* as a "counter-*Marbury*, for the administrative state," that it has come under intense judicial critique. That is particularly true in recent years, when criticism reached a fever pitch, putting the doctrine "under siege."[19] At the highest level, the "predominant arguments against *Chevron* deference fall into two main categories: Article III and Article I concerns."[20]

In a number of separate writings, several Supreme Court justices have raised pointed criticisms of the *Chevron* doctrine.

For example, in *Michigan v. EPA*, Justice Thomas noted that "we seem to be straying further and further from the Constitution

without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency 'interpretations' of federal statutes."[21]

Just before his retirement from the Court, Justice Kennedy likewise wrote separately in a case "to note [his] concern with the way in which the Court's opinion in [*Chevron*] has come to be understood and applied."[22]

Then-Judge Gorsuch wrote a separate opinion concurring in his own majority opinion in favor of an agency under *Chevron*, to call on the Court to revisit the doctrine. He astutely observed that a tension between the Constitution and *Chevron* was "an elephant in the room," warranting reconsideration of the doctrine, and opined that "[w]e managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change—except perhaps the most important things."[23] Since joining the Court, Justice Gorsuch has also signed onto Justice Thomas' calls to reconsider *Chevron*.[24]

Finally, then-Judge Kavanaugh publicly criticized the *Chevron* doctrine not in a judicial opinion, but in a book review, calling the doctrine an "atextual invention by courts" that gives excessive power to agencies.[25] Notably, Justice Kavanaugh has also declined to join Justices Thomas' and Gorsuch's calls to reconsider *Chevron*, electing instead to write separately in favor of a narrowing of the doctrine.[26]

The Vehicle for Reconsideration of *Chevron* Has Arrived—*Loper Bright Enterprises v. Raimondo*

Nearly 40 years after it announced *Chevron*, the Supreme Court has granted a petition for a writ of certiorari in *Loper Bright Enterprises v. Raimondo*,[27] on the question of whether to reconsider the doctrine. *Loper Bright* concerns whether the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act)[28] authorizes certain industry-funded monitoring programs. The Magnuson-Stevens Act seeks to protect "the food supply, economy, and health of the Nation."[29] The key to the statutory scheme is the promulgation and enforcement of so-called "fishery management plans," which are designed "to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote

the long-term health and stability" of fisheries in U.S. waters.[30] The Magnuson-Stevens Act establishes eight regional fishery management councils[31] to advise the Secretary of Commerce[32] in the "preparation, monitoring, and revision of such plans."[33] The Secretary, and by delegation the National Marine Fisheries Service (NMFS), reviews regional council proposals and promulgates final regulations based on those proposals and public input, among other things.[34]

In 2020, NMFS finalized a fishery management plan that would require "industry-funded monitoring" across all New England fisheries in any year when various conditions are met.[35] Under the plan, 50% of herring permitted herring vessels, for example, would be required to either have a federally funded or industry-funded monitor on board during fishing trips.[36] NMFS has estimated that "industry's cost responsibility associated with carrying an at-sea monitor" is "$710 per day." On an annual basis, the program is estimated to "reduce" returns-to-owner by "approximately 20 percent."[37]

A group of four family owned and family operated herring fishing companies initially challenged the fishery management plan's requirement of industry-funded monitoring in the U.S. District Court for the District of Columbia. The district court applied *Chevron*'s two-step framework and deferred under Step One to NMFS's interpretation of the Magnuson-Stevens Act, which it found "explicitly provides" that a fishery management plan may require that observers "'be carried on board a [domestic] vessel . . . engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery.'"[38] The district court also observed that, in a neighboring provision, the Magnuson-Stevens Act states that a fishery management plan shall "contain the conservation and management measures . . . necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery."[39]

The fishing companies appealed the district court's decision to the U.S. Court of Appeals for the District of Columbia Circuit, which affirmed in a split decision. The majority likewise applied "the familiar two-step *Chevron* framework" and deferred under Step Two to NMFS's statutory interpretation.[40] The majority concluded that the statute is not "wholly unambiguous" and in fact leaves

"unresolved" the question whether NMFS "may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan."[41] Nevertheless, the majority deferred to NMFS's interpretation as a "reasonable" way of resolving the "silence on the issue of cost of at-sea monitoring."[42]

Judge Walker dissented. In his view, Congress had not unambiguously "authorize[d NMFS] to make herring fishermen in the Atlantic pay the wages of federal monitors who inspect them at sea."[43] He recognized that "[r]egulatory mandates . . . often carry compliance costs," but observed that NMFS "has identified no other context in which an agency, without express direction from Congress, requires an industry to fund its inspection regime."[44] Among other things, Judge Walker also noted that "if Congress had wanted to allow industry funding of at-sea monitors in the Atlantic herring fishery, it could have said so," but it "instead chose to expressly provide for it in only certain *other* contexts."[45] In sum, Judge Walker found that nothing in the Magnuson-Stevens Act authorizes NMFS to require herring fishermen to "spend a fifth of their revenue on the wages of federal monitors embedded by regulation onto their ships."[46]

In their petition for a writ of certiorari from the Supreme Court, the fishing companies argued that the D.C. Circuit majority "got an exceptionally important issue exceptionally wrong."[47] According to the fishing companies,

> One of the few bulwarks of the citizenry against overregulation is that federal agencies must limit their regulations to those they can practically enforce given resources expressly authorized by Congress. The decision below eviscerates that practical limit by green-lighting federal agencies to make the citizenry foot the bill for enforcing their regulatory regimes in the absence of any congressional authorization for those costly and controversial practices.[48]

The fishing companies further argued that the D.C. Circuit majority's basis for "reach[ing] that result by applying *Chevron* only heightens the stakes and the need for this Court's plenary review. . . . Lower courts see ambiguity everywhere and have abdicated the core judicial responsibility of statutory construction to executive-branch agencies."[49] In short, according to the fishing companies, "[i]f *Chevron* really requires deference in these circumstances,

then *Chevron* can no longer be ignored, but must be overruled so that lower courts stop abdicating their responsibility to interpret statutes sensibly whenever they confront any difficulty that can be labeled an ambiguity."[50]

On May 1, 2023, the Supreme Court granted review in *Loper Bright*, side-stepping the question of whether the District of Columbia Circuit correctly applied *Chevron*. Instead, the Court granted review solely on the second, far-broader question presented by the petition: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[51] The implication is that at least four of the Court's nine justices are more interested in the broader application of *Chevron* deference than in the interplay of the Magnuson-Stevens Act and fishery management plan at issue in *Loper Bright*.[52]

Potential Effects of Supreme Court Review

While *Loper Bright* has yet to be set for oral argument, it is likely to be argued in fall 2023 and decided by summer 2024. In the near term, litigants currently engaged, or who expect to be engaged, in APA litigation will inevitably be closely monitoring whether their cases could benefit from arguments raised in *Loper Bright* or a stay pending the Court's decision.

In the longer term, the potential effects of *Loper Bright* are considerable. If the Court accepts the *Loper Bright* fishing companies' invitation to overrule or limit *Chevron*, it would be a landmark moment in administrative law. Fundamentally, the judicial scales will no longer be tipped in favor of federal agencies whenever ambiguity is present, at least insofar as statutory interpretation is concerned. And, invariably, the public and regulated parties will have greater chances of success in challenging the validity of an agency's interpretation of its operating statute under the APA and other statutes.

It remains unclear, however, what alternative standard *Loper Bright* will announce if it overrules or limits *Chevron*. If the Court overrules *Chevron* outright, we may see a resurgence in the *Skidmore* doctrine's far-less-deferential standard in cases of agency statutory interpretations. And, if the Court stops short of overruling

Chevron and merely limits its reach, there may be far fewer cases where courts find true statutory "ambiguity" after application of the traditional tools of statutory construction.

In any event, it seems likely that the Court's decision in *Loper Bright* will certainly make it more difficult for agencies to promulgate audacious regulatory schemes that are not clearly supported by statutory text. Agencies will have their work cut out for them in such instances, with greater primacy inevitably being placed on development of robust rulemaking records and supporting statutory interpretations, which it would behoove regulated parties to likewise take a greater interest in.

There will also be the question of challenges to existing rules under whatever new test may be announced in *Loper Bright*. Regulatory actions that might have formerly survived review under *Chevron* might suddenly be susceptible to challenge under *Loper Bright*. This may take the form of facial challenges to seemingly settled regulatory schemes, which generous statutes of limitation may permit,[53] or as-applied challenges in the enforcement context. As suggested throughout this article, agencies routinely prevail in the lower courts under *Chevron*'s two-step framework, often relying on generalized statutory authorizations. Under *Loper Bright*, the balance of power may decidedly shift away from agencies, which may encourage litigants to bring more aggressive and frequent challenges to agency action than they otherwise have over the past 40 years since *Chevron* was decided.

Notes

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1. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

2. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

3. Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L.J. 908, 918 (2017).

4. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 3 Duke L.J. 511, 516 (1989).

5. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

6. 5 U.S.C. § 706.

7. Bamzai, *supra* note 3, at 987-89.

8. U.S. Dep't of Justice, Atty Gen.'s Manual on the Admin. Proc. Act (1947).

9. Thomas W. Merrill, The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State 47-48 (2022).

10. Chevron, 467 U.S. at 840.

11. *Id.* at 861-64.

12. *Id.* at 845.

13. Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 982-85 (1992).

14. *Id.*

15. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 454-55 (1987) (Scalia, J., concurring) (criticizing the majority's rationale as being at odds with *Chevron* because it would have meant not deferring to the EPA's interpretation in *Chevron*, given that the question there involved purely statutory interpretation.).

16. *See, e.g.*, Mead Corp. v. Tilly, 490 U.S. 714 (1989).

17. Nathan D. Richardson, Deference Is Dead, Long Live Chevron, 73 Rutgers L. Rev. 441, 443 (2021).

18. Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2074-75 (1990).

19. *See generally* Richardson, *supra* note 17, at 495-503; Cass R. Sunstein, Chevron as Law, 107 Geo. L.J. 1613, 1615 (2019).

20. Christopher J. Walker, Attacking Auer and *Chevron* Deference: A Literature Review, 16 Geo. J.L. & Pub. Pol'y 103, 112 (2018).

21. Michigan v. EPA, 576 U.S. 743, 761-64 (2015) (Thomas, J., concurring). Justice Thomas has since continually called for *Chevron* to be reconsidered at every opportunity. *See, e.g.*, Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring).

22. Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). As with Justice Thomas, Justice Kennedy also then expressly called for *Chevron* to be reconsidered "in an appropriate case." *Id.* 2120-21.

23. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

24. *See, e.g.*, PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2057 (2019) (Thomas, J., concurring) (questioning the constitutionality of Chevron under Article III's Vesting Clause).

25. Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150-51 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)).

26. PDR Network, 139 S. Ct. at 2056-57 (2019) (Kavanaugh, J., concurring).

27. Loper Bright Enterprises v. Raimondo, No. 22-451.

28. 16 U.S.C. § 1801 et seq.

29. *Id.* § 1801(a)(1)-(4).

30. *Id.* § 1853(a)(1)(A).

31. *Id.* § 1852(a),

32. *Id.* § 1801(b)(5).

33. 16 U.S.C. § 1801(b)(5).

34. *Id.* §§ 1853(c), 1854(a).

35. *See* 85 Fed. Reg. 7,414 (Feb. 7, 2020).

36. *Id.* at 7,417.

37. *Id.* at 7,417-18.

38. Loper Bright Enters., Inc. v. Raimondo, 544 F. Supp. 3d 82, 104 (D.D.C. 2021) (quoting 16 U.S.C. § 1853(b)(8)).

39. *Id.* (quoting 16 U.S.C. § 1853(a)(1)(A)).

40. Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 370 (D.C. Cir. 2022).

41. *Id.* at 366.

42. *Id.* at 370.

43. *Id.* at 372 (Walker, J., dissenting).

44. *Id.* at 376.

45. *Id.* at 377 (emphasis in original).

46. *Id.* at 379.

47. Petition at 14, Loper Bright Enterprises v. Raimondo, No. 22-451 (Nov. 10, 2022).

48. *Id.*

49. *Id.* at 14-15.

50. *Id.* at 15.

51. *Id.* at i-ii. The Court declined to consider the first question presented by the petition, which was whether the lower court had properly applied *Chevron*. *Id.* at i.

52. It is also notable that Justice Jackson has recused herself from consideration of *Loper Bright* in the Supreme Court, presumably because she heard oral argument in the case while still a judge of the District of Columbia Circuit but did not ultimately participate in that decision.

53. *See, e.g.*, 28 U.S.C. § 2401(a) (default six-year limitations period applicable to many APA claims, absent a more-specific limitation for challenging a particular agency action).

Before Acquiring a U.S. Company, Do Not Forget to Consider This Important Regulatory Hurdle

Eric McClafferty, Matthew C. Luzadder, Alla M. Taher, and Jeffrey Hunter*

The authors explain that when a non-U.S. company acquires a U.S. company, the acquisition may need to be reviewed by the U.S. Committee on Foreign Investment in the United States.

The United States is the world's top destination for foreign direct investment (FDI).[1] In 2021, the United States recorded the largest increase of inward FDI of all economies.[2] European and other foreign companies are deeply embedded in traditional and renewable U.S. energy markets, having invested over $400 billion in U.S. energy-related industries.[3] It is expected that FDI into renewable energy will continue to grow substantially in the coming years.[4]

For non-U.S. companies, sometimes it makes sense to enter or expand in the lucrative U.S. market through an acquisition or merger. But there are significant regulatory hurdles to overcome when a non-U.S. company tries to buy or control a U.S. company, including understanding whether the proposed transaction must (or should) go through a review by the U.S. Committee on Foreign Investment in the United States (CFIUS or Committee).

Chaired by the U.S. Secretary of the Treasury, CFIUS includes representatives from several U.S. departments and agencies who are tasked with reviewing the national security implications of foreign investments in U.S. companies. In 2018, the U.S. Congress expanded the jurisdiction of CFIUS by passing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). FIRRMA also made significant changes to the CFIUS review process. As a result, many more foreign investment transactions are subject to review and increasing scrutiny by CFIUS. This is especially true for the energy sector, where companies often deal with critical infrastructure and

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technologies that implicate national security. Moreover, transactions that involve real estate purchases might need to go through a CFIUS process simply because of their location.

The overall number of transactions reviewed by CFIUS has dramatically increased over recent years.[5] Failing to obtain a CFIUS review can have significant and costly consequences for non-U.S. investors, including monetary penalties for failure to file a mandatory review request and the forced unwinding of business transactions.[6] For these and multiple other reasons, it is crucial for investors to thoroughly consider whether a particular transaction should be reviewed by CFIUS before it is completed.

Does My Transaction Require CFIUS Review?

CFIUS is authorized to review any "covered transaction," which is defined broadly to include transactions that could:

1. Directly or indirectly result in foreign control of any U.S. business;[7]
2. Afford a foreign person certain rights or decision-making authority over a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies (TID[8] U.S. business),[9] or
3. Afford a foreign person access to nonpublic technical information in possession of a TID U.S. business.[10]

This last prong is not limited to the non-U.S. investors themselves, but also the non-U.S. investors' relationship contacts or vendors who may indirectly gain access to information. For example, if the business will include investors who have dealings with countries or individuals that are of national security concern, then this too may trigger a CFIUS review.

Non-U.S. energy investors will also need to consider whether their proposed transactions are covered by new CFIUS regulations. Specifically, as indicated, the new regulations cover real estate purchases and leases, as well as the acquisition of concessions, easements, or other land rights that may be necessary for solar, wind, water, or other U.S.-based energy products.[11] This is especially true when the relevant real estate is located near military installations and other sensitive U.S. government facilities.[12] Every U.S. energy

investment by a non-U.S. investor should go through a location diligence process to spot CFIUS concerns.

Additionally, the regulations mandate review of certain energy sector transactions involving critical infrastructure and critical technologies.

First, review is mandatory when the target U.S. company manufactures, operates, owns, services, or otherwise supplies certain "critical infrastructure."[13] Critical infrastructure is broadly defined to cover "bulk-power system" facilities for generating, transmitting, distributing, or storing electric energy identified under the Federal Power Act.[14] This includes "electric storage resources" that are physically connected to bulk power systems, as well as any electrical power generation, transmission, distribution, or storage system that directly services or is located on a U.S. military installation.[15]

The definition of "critical infrastructure" also includes other energy-related installations such as industrial control systems,[16] oil refineries,[17] crude oil storage facilities,[18] oil and gas pipelines, as well as terminals and underground storage facilities for liquefied natural gas.[19]

Second, review is mandatory when the target company conducts business in "critical technologies."[20] The definition of "critical technologies" captures a broad spectrum of dual-use commercial technologies, including many that are routinely used in the energy sector.[21] This includes the equipment, components, and certain software. Many U.S. energy industry acquisition targets use controlled fluid handling processing equipment, including pumps, valves, piping, distillation columns, and other equipment that is considered critical technology. And U.S. targets also have controlled information on how to develop, produce or use this equipment, which is also critical technology. Many other types of equipment and know-how, including lasers, sensors, propulsion, and navigation items, needed to manage power generation may be included.[22] Controlled defense articles or services, nuclear equipment—including their parts, components, software, and technology—and other emerging technologies may also be included.[23] Filings are also mandatory where the target company designs, develops, fabricates, manufacturers, or tests one or more "emerging and foundational technologies" as defined in the Export Control Reform Act of 2018, which are outside the definition of "critical technologies."[24]

Essentially, the more sensitive the technology to U.S. foreign policy and/or national security interests, the more likely it will

trigger mandatory review. Given how much critical technology is present in the U.S. energy industry, diligence regarding the presence of these items is absolutely critical to understanding if a CFIUS filing is mandatory, advisable, or not needed. In light of the complexity involved, that analysis should be guided by experienced counsel.

These rules apply broadly, are complex, and must be considered before any foreign investment in the U.S. energy sector. Even if filing does not appear to be mandatory, it may still be worthwhile to submit a notice or declaration given CFIUS's broad authority to review transactions and their increasingly active surveillance of acquisitions in the United States.[25]

How Does the CFIUS Review Process Work?

Parties seeking safe harbor through CFIUS reviews of U.S. transactions may voluntarily undertake two processes: the Declaration process and the Notice process. CFIUS also has the authority to unilaterally review pending or completed transactions absent a voluntary filing by the parties if a member of the Committee has reason to believe that the transaction is subject to CFIUS jurisdiction and may raise national security concerns.[26] Note, however, that as indicated above, a filing of some sort may be mandatory, depending on the circumstances.

Declaration Process

The Declaration process involves the parties submitting a short-form Declaration notifying CFIUS of a U.S. transaction with potential national security implications to receive review and a potential safe harbor letter that bars CFIUS from subsequently initiating a review of a transaction. In some circumstances, filing at least a Declaration is mandatory, particularly where a foreign government is acquiring substantial interest in certain U.S. businesses and for certain covered transactions that involve critical infrastructure and technologies (as previously described).[27] The number of covered transaction Declarations assessed by CFIUS has substantially increased over the years, from just 20 in 2018 to 164 in 2021.[28] Out of the 164 declarations assessed in 2021, CFIUS determined that 47 were mandatory filings.[29]

CFIUS's receipt and acknowledgment of the Declaration initiates a 30-day assessment window, during which the Committee evaluates and asks questions to glean a better understanding of the reported transaction. After assessing a submitted declaration, CFIUS will:

1. Request that the parties file a written notice;
2. Inform the parties that the Committee is unable to reach a conclusion and that the parties may file a written notice;
3. Initiate a unilateral review; or
4. Notify the parties that the Committee has determined that the transaction does not pose any unresolved national security concern or that any such concern is adequately addressed by other legal authorities or mitigation measures.[30]

In 2021, CFIUS was unable to conclude action following assessment of 12 declarations and requested the parties file a written notice in 30 of the declarations.[31]

The Declaration process can be useful if the parties' attorneys believe there may be a CFIUS interest in learning about the transaction, but there is a good chance that CFIUS will not be concerned about national security issues such that the Committee would be willing to allow the investment to proceed without a full review. There are a variety of circumstances where a Declaration process may be sufficient, but each case is different and companies should speak with experienced counsel to evaluate whether a CFIUS filing must be, or should be, made, and if that filling should be a Declaration or a request for full review.

Although there are many circumstances where a Declaration process may be sufficient, sometimes CFIUS will determine that a full Notice is necessary to satisfy its statutory obligations. It is critically important to understand that the transition to the full Notice process does not constitute a "failed" Declaration process. This action by CFIUS often means that the Committee requires more time and information to evaluate the proposed transaction. To that end, the Notice process is more in-depth, hence the longer review period. It can also mean that CFIUS identified a national security issue that requires more consideration on their part. It may also mean CFIUS might be considering certain national security risk mitigation measures they want the companies to implement,

including through a National Security Agreement, which is most effectively accomplished through the Notice context.

Notice Process

If Notice is submitted, CFIUS staff will begin what is called the "Pre-Clearance and Notice Review Period." The pre-clearance process typically takes 10-21 days, but it can take more or less time, depending on the complexity of the Notice. Once the pre-clearance process is complete, on the following business day, CFIUS will start the formal 45-Day Review Period.[32] CFIUS may extend the initial review period into a subsequent "45-Day Investigation Period," and CFIUS must complete its review within this second 45-day window.[33]

If CFIUS determines that a covered transaction presents national security risks and that other provisions of law do not provide adequate authority to address the risks, CFIUS may enter into an agreement with, or impose conditions on, the parties to mitigate such risks.[34] The U.S. Department of the Treasury's Office of Monitoring & Enforcement oversees CFIUS mitigation measures established in national security agreements with transaction parties.

CFIUS generally does not require that a declaration be withdrawn and refiled, except to permit the parties to correct material errors or omissions, or to describe material changes to the transaction in the original declaration.[35] CFIUS may discuss with parties whether withdrawal and refiling makes sense in other circumstances. In some cases, even if a party has voluntarily chosen to abandon a transaction, CFIUS may determine that mitigation measures are needed to effectuate such abandonment and address any attendant risk that arises as a result of the transaction.[36] In short, once a CFIUS submission is made, CFIUS effectively retains jurisdiction over the potential acquisition.

On rare occasions, if CFIUS determines that a transaction poses unresolved national security concerns that cannot be mitigated, it will refer the transaction to the president, unless the parties choose to abandon the transaction or to withdraw and refile the case to give CFIUS more time to consider the matter, including a review of mitigation measures proposed by the parties.[37] The president then has to make a decision no later than 15 days after the completion of CFIUS's investigation or the date on which CFIUS referred the

transaction to the president.[38] The president may suspend or prohibit the transaction, including by requiring divestment.[39]

If CFIUS determines that there is no unresolved national security risk or that other provisions of law provide adequate and appropriate authority to address the risk, it will advise the parties in writing that CFIUS has concluded all action and will issue a "safe harbor" letter.[40] The "safe harbor" letter means that CFIUS and the president will not review the transaction again, absent certain exceptional circumstances, such as the discovery of a material misstatement.[41]

From 2012 to 2021, companies filed 1,829 Notices that CFIUS determined were covered transactions.[42] Similar to the trend in Declarations, the number of covered transaction Notices assessed by CFIUS has steadily increased over the years, from 114 in 2012 to 272 in 2021.[43] CFIUS adopted or imposed mitigation measures to resolve national security concerns with respect to 26 of the Notices, including two notices that were withdrawn and abandoned.[44] Additionally, in nine instances, the parties withdrew the Notice and abandoned the transactions after CFIUS either informed the parties that it was unable to identify mitigation measures that would resolve its national security concerns, or it proposed mitigation measures the parties chose not to accept.[45]

Conclusion

Before investing in the U.S. energy market through the acquisition of an existing U.S. company, non-U.S. companies need to be aware of and plan around CFIUS requirements. CFIUS reporting obligations may be triggered for any transaction that may result in foreign control or influence over critical U.S. infrastructure projects, sensitive U.S. technologies, or investments in certain locations. Traditional and renewable energy companies often work on matters involving critical infrastructure and critical technology. Their projects may be near ports, military bases, and other sensitive locations. It is of vital importance that parties to such transactions conduct enough due diligence and research to make an informed determination as to whether CFIUS review is required or otherwise advisable.

Not conducting a mandatory CFIUS review can lead to a civil penalty up to $250,000 per violation, or a penalty that equals the

value of the proposed transaction, whichever is greater (not to mention the possibility of complicated and difficult forced unwinding of acquisitions that have occurred).[46]

In short, non-U.S. companies should consult with expert legal counsel to determine whether review is required; and if it is, to prepare an effective CFIUS submission and to take steps to make approval likely.

Notes

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5. Committee on Foreign Investment in the United States, Annual Report to Congress for CY 2021 at 15-16.

6. *See* 50 U.S.C. § 4565.

7. 31 C.F.R. §§ 800.210 and 800.213(a).

8. "TID" stands for Technologies, critical Infrastructure and personal Data. *See* Fact Sheet: Final CFIUS Regulations Implementing FIRRMA, U.S. Dep't of Treasury, Office of Public Affairs, 2 (Jan. 13, 2020), https://home.treasury.gov/system/files/206/Final-FIRRMA-Regulations-FACT-SHEET.pdf.

9. 31 C.F.R. § 800.248.

10. 31 C.F.R. §§ 800.211, 800.213(b), and 800.248.

11. 31 C.F.R. § 802 et seq.

12. 31 C.F.R. § 802 and Appx. A.

13. 31 C.F.R. §§ 800.401(b) and 800.248.

14. *Id.*

15. 31 C.F.R. §§ 800 and Appx. A (xi)-(xiii).

16. *Id.* at Appx. A (xiv).

17. *Id.* at Appx. A (xv).

18. *Id.* at Appx. A (xvi).

19. *Id.* at Appx. A (xvii).
20. 31 C.F.R. § 800.401.
21. 31 C.F.R. § 800.215.
22. *Id.*; 15 C.F.R. § 738.2.
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24. 31 C.F.R. § 215; 50 U.S.C. § 4817.
25. 31 C.F.R. § 800.501(c).
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27. 31 C.F.R. § 800.401.
28. Committee on Foreign Investment in the United States, Annual Report to Congress for CY 2021 at 5.
29. *Id.*
30. *Id.* at viii-ix.
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32. 31 C.F.R. § 800.503.
33. 31 C.F.R. §§ 800.505-508.
34. 31 C.F.R. §§ 800.101-102.
35. 31 C.F.R. § 800.406(d).
36. *Id.*
37. 31 C.F.R. § 800.508(e).
38. 31 C.F.R. § 800.508 (e).
39. 31 C.F.R. §§ 800.101-102, 701.
40. 31 C.F.R. § 800.508(d) and Exec. Order No. 11858, section 7(f) subject only to certain circumstances described in 31 C.F.R. § 800.501(c)(1)(ii).
41. *Id.* at ix.
42. *Id.* at 16.
43. *Id.* at 15-16.
44. *Id.* at 15.
45. *Id.*
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U.S. Department of Homeland Security Launches Fraud Investigations into Dozens of Companies for H-1B Lottery Abuse

Morgan Bailey, Maximillian L. Del Rey, and Kelly B. Kramer*

In this article, the authors discuss a recent initiative by the U.S. Department of Homeland Security to determine whether employers are inappropriately gaming the H-1B lottery system.

To retain the best global talent, many employers leverage the annual H-1B visa lottery to secure work authorization for new employees. The nature of a lottery, however, leads some employers to search for ways to improve their chances of securing that "winning ticket"—and a pathway to retaining key talent in the United States.

Recently, the Department of Homeland Security (DHS) noted that some employers had developed schemes with other entities to submit multiple submissions on behalf of the same prospective employee. These types of arrangements have risen sharply in recent years: DHS announced[1] that more than 52% of total submissions were for beneficiaries with multiple registrations.[2] According to the agency, this practice raises questions about whether employers are inappropriately gaming the H-1B lottery system.

The federal government has announced a tripartite response to combat abuse:

1. DHS will undertake administrative fraud investigations into organizations suspected of colluding to improve prospective employees' chances in the recent H-1B lottery selection process;
2. DHS will begin making law enforcement referrals for criminal prosecution to suspected violator companies; and

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3. DHS intends to amend relevant regulations governing H-1B lottery registrations, as initially announced[3] in the 2021 Unified Regulatory Agenda and Regulatory Plan.

These announcements came as DHS reported a record-high number of submissions for the fiscal year (FY) 2024 H-1B lottery.[4]

Background: The H-1B Lottery

The H-1B nonimmigrant visa category allows U.S. organizations temporarily to employ foreign workers in "specialty occupations"; that is, positions requiring a bachelor's degree or higher in a specific specialty (or its equivalent). Congress statutorily limited the number of new H-1B visas that may be approved each fiscal year to 85,000 (with some exceptions for certain universities, nonprofits, and government entities). Of these 85,000, Congress reserved 20,000 for individuals with U.S. graduate degrees. Historically, demand for H-1B visas has exceeded the available quota, making it a coveted category.

In 2020, DHS moved to an electronic registration system that allows employers to register candidates for the H-1B lottery with relative ease. An employer submits basic data about itself and the prospective employee, including the prospective employee's name, date of birth, gender, and passport number, along with a $10 fee. The electronic system then selects registrations at random, and only selected registrants are invited to submit a fully prepared H-1B petition that is reviewed and adjudicated by the agency.

In determining the number of registrations to select each year, DHS takes into account historical data related to approvals, denials, revocations, and other factors. For FY 2024, DHS selected approximately 110,000 of the submissions and expects to approve 85,000 new H-1B petitions from this pool. The result was a historically low rate of selections—only 14.6% of registrations (less than one in six) were selected through the lottery.

Multiple Registrations for Prospective Employees

Some have speculated that the relative ease with which beneficiaries can be entered into the H-1B lottery has led employers to work together in order to capture at least one H-1B selection

for a given employee.[5] This is because the registration system is drastically simpler than preparing a full H-1B petition, which used to be required for all lottery entries but is now only necessary for selected registrants. Even so, the new electronic registration process has enabled DHS to more quickly identify the number of prospective employees who are the subject of multiple submissions. It has also enhanced the agency's ability to identify trends and areas of potential fraud. While the government's announcement regarding its fraud investigations has raised awareness, the issue is not new. DHS recognized the potential for employers to exploit the selection process and has previously issued regulations in 2008 and agency guidance in 2018 to combat potential abuse.[6]

The regulations penalize "related entities" for submitting multiple registrations on behalf of the same prospective employee unless there is a "legitimate business need" for multiple submissions. As part of the registration process, employers are required to attest under penalty of perjury that they have not colluded with any other entity to increase the chances of selection for the prospective employee. Attempts to gain an unfair advantage through coordinated efforts to submit multiple registrations may be considered fraud and subject to legal penalties, including employers' potential debarment from the H-1B program.

The government's policy guidance[7] defines "related entities" broadly. Under the policy, the term "related entities" includes companies "*whether or not related through corporate ownership and control*" that submit registrations for the same individual "for substantially the same job."[8] Thus, companies that submit multiple registrations may be considered related entities even if they function at arm's length. Such companies may be found to be in violation of the law if, for example,

- Both organizations submit registrations for the same beneficiary, and agree that one will subcontract the prospective employee to the other (or another third party) if selected; or
- The company that is selected and approved quickly terminates the selected employee, enabling the employee to transfer to the other employer without going through the registration process again.

According to DHS, it would be unlikely that two unwitting employers would have the requisite similitude to trigger the bar

but the more similarities in the records, the more likely the agency will determine that the entities were acting in concert to undermine the purpose of the random lottery process.[9]

Withdrawal of a duplicate registration by one of the entities does not cure the issue. Under the regulations, once DHS determines that a violation has occurred, all submissions filed on behalf of the prospective employee must be denied or revoked.

Rise in Multiple Registrations Increases Agency Concern

The federal government's investigations of dozens of companies suspected of attempting to secure an unfair advantage in the H-1B process may result in a shortfall of approved H-1B petitions, either because the government may identify additional tainted petitions among the selections or because of penalties against employers found to be in violation of the registration rules. The agency may ultimately deem it necessary to conduct a second round of selections in order to reach the statutory cap. Based on trends in prior years, this announcement may not come until July 2023 or later. (See Table 1.)

DHS previously reported[10] it was furthering its efforts to combat fraud by enhancing and increasing site visits, interviews, and investigations of employers who use the H-1B program. The agency also created a tip form[11] for reporting suspected fraud and abuse.

Guidance for Employers Amid Additional H-1B Scrutiny

The investigations announced by the government are specific to employers suspected of gaming the H-1B registration system, but all employers should be prepared to document and explain their practices for H-1B registration, including any safeguards they have in place to ensure that the same prospective employee is not inappropriately registered twice by different entities—whether or not those entities are under common ownership or control.

In the event a prospective employee has been registered more than once, employers should be prepared to show a legitimate business need for multiple registrations.[12] The agency may consider such

Table 1. Registration and Selection Numbers for FY 2021-2024

Cap FY	Total Registrations	Eligible Registration[1]	Beneficiaries with No Other Eligible Registrations	Beneficiaries with Multiple Eligible Registrations	Selections	Percentage of Eligible Registrations Selected
2021	274,237	269,424	241,299	28,125	124,415	46.1%
2022	308,613	301,447	211,304	90,143	131,924	43.7%
2023	483,927	474,421	309,241	165,180	127,600	26.9%
2024	780,884	758,994	350,103	408,891	110,791	14.6%

[1] The count of eligible registrations excludes duplicate registrations, those deleted by the prospective employer prior to the close of the registration period, and those with failed payments.

factors as familial ties, proximity of locations, leadership structure, employment history, similar work assignments, and substantially similar supporting documentation.[13]

More broadly, the increased scrutiny being applied to registrations is a reminder to all H-1B employers to ensure ongoing compliance with H-1B regulations. It is important to plan ahead for possible site visits, interviews, and investigations relating to the H-1B program.

Best practices for H-1B employers include the following:

- *Prepare for a site visit.* U.S. Citizenship and Immigration Services officials may collect and verify information through site visits. These may be unannounced or preceded by a request to meet. This process may include reviewing the H-1B petition and supporting documents, researching information in public records, and interviewing the employer, the beneficiary, and others. Participation is voluntary. If the employer or beneficiary expresses an unwillingness to participate, the federal officers will end the site visit and instead complete the review based on the information available.
- *Create a reception plan.* Because federal authorities may make unannounced site visits, employers should prepare a set of standard operating procedures (SOPs) for receiving government officials if and when they arrive. The SOP should include guidance for employees (e.g., receptionist, human resources [HR] staff, in-house counsel, petition signatory, the beneficiary), instructions for verifying the identity of the federal officers, designated space for audit activities, location of files to be pulled, and specific lists of the documents the company is prepared to share. The SOP should anticipate government visits at sites outside of the corporate headquarters or major worksites and plan accordingly.
- *Prepare a call sheet.* Employers should know beforehand exactly who they will notify if a government visit is taking place. This includes HR officials, in-house counsel, and other senior executives, as well as outside immigration counsel. Specific contacts should be identified for issue escalation. The goal is to ensure all decision-makers are apprised and ready according to established communication

channels—not to create a panic that could impede the employer's plan for resolution of an investigation or audit.

- *Know where your PAFs are.* Employers are obliged to maintain a Public Access File (PAF) for sponsored H-1B, H-1B1, and E-3 positions. PAFs provide additional detail on the Labor Condition Applications (LCAs) submitted with these nonimmigrant petitions, and members of the public are entitled to request these records. An electronic database of PAFs, segregated from other HR systems to protect confidential employee data, is a straightforward way to ensure ready compliance.

Employers should plan accordingly and review their employment and HR policies and practices across worksite locations.

Notes

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1. https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process.

2. Of the more than 780,000 total registrations, approximately 408,000 were for beneficiaries with multiple registrations.

3. https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=1615-AC70&Image61.x=0&Image61.y=0.

4. https://www.uscis.gov/newsroom/alerts/fy-2024-h-1b-cap-season-updates.

5. At least one district court has found that there is no authority preventing prospective employees from increasing their own chances of being selected, such as by seeking out as many sponsoring employers as possible. Fontenoy Eng'g Inc. v. Baran (N.D. Cal. Jan. 13, 2020).

6. 8 C.F.R. § 214.2(h)(2)(i)(G); Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt from the Annual Numerical Limitation, 73 Fed. Reg. 15389-95, 15391-93 (Mar. 24, 2008); Matter of S- Inc., Adopted Decision 2018-02 (AAO Mar. 23, 2018).

7. https://www.uscis.gov/sites/default/files/document/memos/2018-3-23-PM-602-0159-Matter-of-S-Inc-Adopted-Decision-Package.pdf.

8. Matter of S- Inc., Adopted Decision 2018-02 (AAO Mar. 23, 2018) (emphasis added).

9. *Id.*

10. https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program.

11. https://www.uscis.gov/report-fraud/uscis-tip-form.

12. Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt from the Annual Numerical Limitation, 73 Fed. Reg. 15389-95, 15392 (Mar. 24, 2008).

13. Matter of S-Inc., Adopted Decision 2018-02 (AAO Mar. 23, 2018).

Proposed Environmental Protection Agency Carbon Pollution Standards Would Impact Energy Sector

Matt Ahrens, Allison Sloto, Allan T. Marks, and Thomas D. Goslin*

In this article, the authors examine the Environmental Protection Agency's proposed greenhouse gas emission standards for new and existing fossil fuel–burning power plants.

The Biden administration has announced its long-anticipated proposed greenhouse gas (GHG) emission standards[1] for new and existing fossil fuel–burning power plants (the Proposed Rule). In its press release,[2] the U.S. Environmental Protection Agency (EPA) stated that the Proposed Rule would reduce total carbon dioxide emissions by 617 million metric tons by 2042, as well as cutting tens of thousands of tons of other air pollutants, including particulate matter, sulfur dioxide, and nitrogen oxide. The EPA noted that the power sector in 2020 constituted the largest stationary source of GHG emissions in the United States, emitting 25% of the overall domestic emissions. The EPA estimates that the Proposed Rule would result in an additional 42 gigawatts of coal plant retirements, or nearly a quarter of existing coal-fired plants, by 2040. The EPA projects that within that same time frame, demand for natural gas from the power sector would fall by 37%.

The Proposed Rule would impose new source performance standards (NSPS) for GHG emissions from new fossil fuel–fired (primarily new natural gas-fired units) stationary combustion turbine electric-generating units (EGUs) as well as emission guidelines for (1) large, frequently used existing stationary combustion engines (primarily natural gas–fired units, defined as those larger than 300 megawatts with a capacity factor of greater than 50 percent), and (2) existing steam-generating EGUs (primarily existing coal units). The most restrictive EPA standards focus on new gas-fired EGUs and on existing fossil fuel–fired EGUs that are large or more frequently used. Less stringent regulations apply to existing fossil

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fuel-fired EGUs that are smaller or that operate only occasionally (peaking units). Because no new coal plants have been built in the United States in over a decade and almost all the still-operational coal plants are facing retirement within the next few decades, the EPA decided to effectively grandfather all existing coal plants by imposing minimal requirements on those closing by 2040 and no new requirements (save the requirement to not increase their emissions rates) for those closing by 2032 or 2035.

It is clear that the EPA took care in crafting the Proposed Rule to fit within confines imposed by *West Virginia v. EPA*, overturning previous attempts to regulate GHG emissions from the power sector by the Obama administration. Further, in developing the Proposed Rule, the EPA conducted an environmental justice analysis consistent with guidance from the Council on Environmental Quality to engage with the overburdened communities disproportionately affected by fossil fuel–fired power plants and ensure that the advancement of carbon capture, utilization, and sequestration technologies are done in a responsible manner that incorporates the input of communities and reflects the best available science. Whereas the Obama administration took a novel approach by seeking to require states to meet GHG emissions targets and providing them with considerable flexibility to do so (which the Supreme Court ultimately found to exceed the regulatory mandate granted by Congress under the Clean Air Act), the Biden administration has hewed more closely to traditional Clean Air Act requirements by requiring each emission source to meet specified standards.

As required by the Clean Air Act, Section 111, the Proposed Rule requires sources to implement the best system of emission reduction (BESR) that has been demonstrated to improve the GHG emissions performance of the sources (accounting for costs, energy requirements, and other factors, and considering a range of technologies). Although the Proposed Rule sets caps on pollution rates rather than mandating the use of specific equipment to capture carbon emissions, it is clear that the Proposed Rule heavily relies on the EPA's conclusion that the BESR for many power plants is carbon capture and sequestration (CCS) technology that is not yet widely used. The Biden administration expressed confidence that this technology will become commercially available as a result of the new government incentives included in the Inflation Reduction Act that provide significant funding for emerging GHG-reduction technologies.

The EPA is also soliciting public comment on whether it should apply the Proposed Rule's requirements more broadly, including to natural gas–fired units as small as 100 megawatts and/or those that operate only 40% of the time.

NSPS for New EGUs (Natural Gas)

The EPA is proposing to create three new subcategories based on the function that the combustion turbine serves:

1. Low load peaking units that consists of combustion turbines with a capacity factor of less than 20%;
2. Intermediate load that consists of combustion turbines with a capacity factor ranging between 20% and a source-specific upper bound that is based on the design efficiency of the combustion turbine; and
3. A base load consisting of combustion turbines that operate above the upper-bound threshold for intermediate load turbines.

For each subcategory, the EPA is proposing a distinct BESR and performance standards.

Emission Guidelines for Large and Frequently Used Existing Combustion EGUs (Natural Gas)

The EPA is proposing that the BESR for these units is based on either a 90% capture of carbon dioxide emissions using CCS by 2035, or co-firing of 30% by volume of low-GHG hydrogen beginning in 2032 and co-firing 96% by volume low-GHG hydrogen beginning in 2038.

Emission Guidelines For Existing Steam-Generating EGUs (Coal)

The EPA has determined that CCS satisfies the BESR criteria for existing steam-generating EGUs because it is adequately demonstrated, achieves significant GHG reductions, and is cost-effective. The cost-effectiveness depends on how long the units will remain

operational, and therefore the EPA is proposing subcategories based on operating horizon:

1. For units that will permanently cease operations prior to January 1, 2040, and are not in other subcategories, the BESR will be co-firing 40% natural gas on a heat input basis (with a 16% reduction in emission rate);
2. For units that will permanently cease operations prior to January 1, 2035, and commit to operating with an annual capacity factor limit of 20%, the BESR is routine methods of operations and maintenance (with no increases in emission rate); and
3. For units that will permanently cease operations prior to January 1, 2032, the BESR is routine methods of operation and maintenance (with no increases in emission rate).

Standards for New, Reconstructed, and Modified Coal EGUs

The EPA noted that the 2015 standards for new coal units, based on CCS, and for reconstructed coal units, based on efficiency, remain in place. The EPA chose not to review the new and reconstructed standards because no new coal units have been constructed in the United States in over a decade, and the EPA does not anticipate any further new units. The EPA is proposing to revise the standards for modified coal units to be based on the BESR or CCS with 90% capture, to ensure consistency for any existing units currently subject to the emissions guidelines that may undergo modification and become subject to the NSPS for new EGUs.

Does the Proposed Rule Go Too Far, Or Not Far Enough?

Arguments already abound that the Proposed Rule goes either too far, or not far enough. The Proposed Rule appears critical to the United States meeting its climate goals under the Paris Agreement to at least halve GHG emissions by 2030. Environmental activists are concerned that the Proposed Rule exempts too many natural gas EGUs and grandfathers coal units that will shut down before

2032 and would like to see the Proposed Rule expand to capture more EGUs. On the other hand, even before the Proposed Rule was released, Senator Joe Manchin, the Chair of the Senate Energy and Natural Resources Committee, came out in opposition of the forthcoming rule and stated that he would oppose Biden's current EPA nominees.[3] Certainly, the finalized version of the Proposed Rule will become the subject of litigation, likely by many of the same Republican attorneys general who challenged the Obama-era Clean Power Plan.

The EPA recently extended the comment period on the Proposed Rule to August 8, 2023. Affected lenders, owners, and operators of fossil fuel–fired EGUs, as well as any party investing in CCS, low-carbon hydrogen, or other green technologies, should track the progression of the Proposed Rule closely and consider the potential effects of new carbon emissions regulations on their facilities' operations.

Notes

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1. https://www.epa.gov/system/files/documents/2023-05/FRL-8536-02-OAR%20111EGU%20NPRM%2020230504_Admin.pdf.

2. https://www.epa.gov/newsreleases/epa-proposes-new-carbon-pollution-standards-fossil-fuel-fired-power-plants-tackle.

3. https://www.manchin.senate.gov/newsroom/press-releases/manchin-to-oppose-every-epa-nominee.

Get Ready to Attest: Three U.S. Departments Release "Further Guidance" on Gag Clause Prohibitions

Laura L. Ferguson and Aaron M. Weiss*

In this article, the authors briefly summarize the rules relating to the Gag Clause Laws found in Part 57 of the Affordable Care Act Frequently Asked Questions and suggest next steps for employer plan sponsors.

The U.S. Departments of Labor, Health and Human Services, and Treasury (collectively, the Departments) have released guidance to initiate the enforcement provisions related to the "gag clause" prohibitions contained in and compliance attestations required by the transparency provisions of the Consolidated Appropriations Act of 2021 (CAA), which is codified in Section 9824 of the Internal Revenue Code of 1986, as amended (Code), Section 724 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and Section 2799A-9 of the Public Health Service (PHS) Act, as amended (together the Gag Clause Laws).[1]

This article briefly summarizes the rules relating to the Gag Clause Laws found in Part 57 of the Affordable Care Act Frequently Asked Questions (ACA FAQ 57) and suggests next steps for employer plan sponsors.

What Are Gag Clauses and Compliance Attestations?

The Gag Clause Laws prohibit "gag clauses." "Gag clauses" are any provisions in an agreement between a group health plan or issuer (i.e., insurance carrier) and a health care provider, network or association of providers, third-party administrator (TPA), or other service provider offering access to a network of providers that would directly or indirectly restrict the group health plan from providing cost or care information to plan participants or

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accessing de-identified claims data, or sharing such information in compliance with privacy regulations (or requiring that such information be shared with a business associate). The Gag Clause Laws also require that group health plans and issuers submit an annual attestation of compliance with the prohibitions on gag clauses (a Compliance Attestation).

Who Must Submit Compliance Attestations?

All employer-sponsored group health plans (whether fully insured, level funded, or self-insured) are subject to the Compliance Attestation requirements, except for excepted benefits (such as standalone dental or vision plans and certain employee assistance programs) health care flexible spending accounts, and health reimbursement arrangements.

When Must Compliance Attestations Be Submitted?

The first Compliance Attestation submission is due by December 31, 2023, and the submission will cover the period of December 27, 2020, through the date of the Attestation. Subsequent submissions will be due by December 31 of each year thereafter, and will cover the respective periods between the most recent submission and the current submission.

How Must Compliance Attestations Be Submitted?

Compliance Attestations must be submitted electronically through the Centers for Medicare & Medicaid Services website at https://hios.cms.gov/HIOS-GCPCA-UI, and the instructions and user manual are available at https://www.cms.gov/cciio/programs-and-initiatives/other-insurance-protections/gag-clause-prohibition-compliance.[2]

Can Compliance Attestation Submissions Be Delegated?

Yes. According to ACA FAQ 57, plans can satisfy their Compliance Attestation obligations by having third parties, such as insurance carriers or TPAs, submit the attestation on their behalf.

Next Steps for Employer Plan Sponsors

- *Fully Insured Plans*. Confirm with the insurance carrier that the carrier will be (1) complying with the Compliance Attestation requirement on its own behalf, and (2) whether the carrier will submit the group health plan's Compliance Attestation on behalf of the plan.

  Note: For fully insured plans, the group health plan and the insurance carrier are each required to annually submit a Compliance Attestation. However, if the carrier submits the Compliance Attestation on behalf of the plan, the plan will be considered to have complied with this requirement.
- *Self-Funded Plans*. Confirm with the TPA whether the TPA will assist with the Compliance Attestation requirement or whether the plan sponsor must submit this for the group health plan.

  Note: Since TPAs that are also carriers (i.e., TPAs that offer fully insured plans and act as TPAs for self-insured group health plans) are permitted to submit a single Compliance Attestation on behalf of themselves, their fully insured group plans, and their self-insured administrative services only (ASO) clients, we anticipate that most plans will not have to carry out the Compliance Attestation themselves. However, the plan sponsor is ultimately liable for any failure to attest (even if the failure is by the TPA), so it is important to amend the ASO to require that the TPA carry out this service and for the TPA to indemnify the plan sponsor for any failure to attest.
- *All Plans*. Review the terms of the existing contracts or ASOs and remove any direct gag clauses or indirect restrictions on the disclosure of data in violation of the Gag Clause Laws prior to submitting Compliance Attestations before the December 31, 2023, deadline. Amend such

agreements to specify the manner in which the carrier or TPA will handle compliance with the Gag Clause Laws and submission of the Compliance Attestation on behalf of the employer-sponsored group health plan.

Conclusion

As is the case with many of the CAA requirements, complying with the Gag Clause Laws and Compliance Attestation requirements is a complex process with numerous parties to involve and steps to take. While the December 31, 2023, deadline is still several months away, now is a good time for plan sponsors to begin consulting with their ERISA attorneys, reviewing their agreements with the carriers/TPAs, and discussing roles and responsibilities with their TPAs and service providers.

Notes

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1. The Gag Clause Laws have been effective since December 27, 2020, the date on which the CAA was signed into law; however, enforcement of the Compliance Attestation requirement was delayed pending further guidance on the gag clause provisions, which has now been issued by the Departments. See the FAQs available at Part 57 of the Affordable Care Act Frequently Asked Questions, https://www.cms.gov/files/document/aca-part-57.pdf.

2. For more information, *see* Q5 through Q13 of ACA FAQ 57.

Food and Drug Administration Publishes Draft Recommendations on Use of Dietary Guidance Statements

Miriam Guggenheim, Jessica O'Connell, and Deepti Kulkarni*

In this article, the authors discuss a recent draft guidance published by the Food and Drug Administration on the use of dietary guidance statements in conventional food labeling.

The Food and Drug Administration (FDA) has published draft Q&A guidance[1] on the use of Dietary Guidance Statements in conventional food labeling. This draft guidance is one piece of the FDA's larger Nutrition Innovation Strategy,[2] under which the FDA aims to modernize food labeling claims. The FDA has previously sought comments[3] on how Dietary Guidance Statements should be regulated and has generally advised that such statements should be truthful and non-misleading, but this draft Q&A guidance represents the most in-depth view on the agency's thinking to date. The FDA's recommendations in the draft guidance are intended to enhance consistency and consumer understanding of Dietary Guidance Statements and help consumers make healthier food choices.

Dietary Guidance Statements

Dietary Guidance Statements are voluntary labeling claims that suggest a food or food group may contribute to or help maintain a nutritious dietary pattern. Dietary Guidance Statements can be provided through written or graphic material and are based on key or principal recommendations from a consensus report, like the 2020-2025 Dietary Guidelines,[4] though reports from other public and private sources may also be eligible. Dietary Guidance Statements can be provided on food labels or in labeling that accompanies a food, which could include certain websites or brochures. The

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FDA provides several examples of claims that would be considered Dietary Guidance Statements, including the following:

- Eat leafy green vegetables as part of a nutritious dietary pattern;
- Make half your grains whole grain; this product contains 12 grams of whole grains per serving;
- Choose fat-free or low-fat dairy products instead of full-fat dairy options; and
- Trail mix can be part of a well-balanced diet.

The FDA explains how it considers Dietary Guidance Statements to differ from certain other FDA-regulated food-labeling claims. Nutrient content claims are different than Dietary Guidance Statements because they more narrowly characterize the level of a certain nutrient in the food, such as "high in protein." Dietary Guidance Statements are also different from the implied nutrient content claim "healthy," though the distinction is more nuanced. The FDA explains that a "healthy" implied nutrient content claim suggests a food may help consumers maintain healthy dietary practices because of its nutrient content; the FDA's requirements for "healthy" implied nutrient content claims are triggered when a food's nutrient content is described as "healthy." In contrast, the FDA says that Dietary Guidance Statements do not characterize the nutrient content of the food and instead provide a broader message about how the product contributes to a nutritious dietary pattern. According to the agency, foods that include a Dietary Guidance Statement may or may not be eligible for a "healthy" implied nutrient content claim, which means that some foods that may not bear that type of "healthy" claim could still claim to be part of a well-balanced diet through a Dietary Guidance Statement. Dietary Guidance Statements are also different than health claims because they do not characterize the relationship of a particular substance with reduced risk of a disease or condition.

If a product bears a Dietary Guidance Statement, the FDA's position is that the product should contain a meaningful amount of the food or food groups that are the subject of the statement, or else the statement may be misleading. The draft guidance sets out "food group equivalents," which represent a meaningful amount of food or food groups that are the subject of the Dietary Guidance Statement. For example, for food products making a Dietary Guidance

Statement related to whole grains, the product should contain at least 12 grams of whole grains. Special rules apply to mixed products where more than one food or food group is the subject of the Dietary Guidance Statement, and to main dishes and meal products. While the FDA recommends that foods bearing Dietary Guidance Statements meet these food group equivalent recommendations, the agency expressed some flexibility regarding raw, whole fruits and vegetables that do not provide the recommended equivalent.

In addition to containing a meaningful amount of a recommended food or food group, the FDA's position is that individual foods and mixed products bearing Dietary Guidance Statements generally should not exceed certain levels for saturated fat, sodium, and added sugars:

- Saturated fat should not exceed 2 grams per reference amount customarily consumed (RACC) (10 percent of the daily value), except saturated fat from nuts and seeds does not count toward this limit;
- Sodium should not exceed 345 milligrams per RACC (15 percent of the daily value); and
- Added sugars should not exceed 5 grams per RACC (10 percent of the daily value).[5]

However, the FDA recognizes that certain foods may exceed these thresholds but still be recommended by consensus reports. For such foods, the FDA advises that Dietary Guidance Statements can still be appropriate, but the product should disclose the amount of the relevant nutrient level present, or else say "see nutrition information for [relevant nutrient] content." This disclosure should be placed "near" the Dietary Guidance Statement and be "visually connected" to it.[6]

Specific Food Categories

Finally, the draft guidance addresses the use of Dietary Guidance Statements on a few specific food categories. The FDA's position is that Dietary Guidance Statements should not be made on dietary supplements because the Dietary Guidelines encourage Americans to meet nutrient requirements through consumption of whole foods. The draft guidance currently addresses only Dietary Guidance Statements for individuals ages two and older. This does

not necessarily preclude the use of Dietary Guidance Statements on foods for infants and children under two, but the FDA says that it intends to consider providing guidance in the future on how Dietary Guidance Statements can be made for such products. Regarding plant-based milk and yogurt, the FDA advises that Dietary Guidance Statements on dairy alternatives are only appropriate when the product is fortified such that the nutrient profile resembles traditional dairy.

Notes

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1. https://www.fda.gov/media/166342/download.

2. https://www.fda.gov/food/food-labeling-nutrition/fdas-nutrition-initiatives.

3. https://www.govinfo.gov/content/pkg/FR-2003-11-25/pdf/03-29448.pdf.

4. https://www.dietaryguidelines.gov/resources/2020-2025-dietary-guidelines-online-materials.

5. The FDA has established higher thresholds for main dish and meal products.

6. A disclosure would not be required when the saturated fat level is exceeded due to the saturated fat in nuts or seeds.

Meme Stock Events: An Analysis of the Securities and Exchange Commission and House Financial Services Committee Reports

Gabriel Benincasa*

In this article, the author discusses reports from the Securities and Exchange Commission and the House Financial Services Committee on recent meme stock events.

Systemic risk. Lately, we have witnessed increased systemic risk in the banking sector with the seemingly instantaneous collapse of a number of banks, due in some cases to rapid withdrawals of deposits. The run-on of such banks was influenced or exacerbated by social media. Social media now plays a larger part in all financial sectors. Runs are no longer because of word of mouth, rather a social media influencer may post a statement and the run begins.

Systemic risk begins like a domino falling, and once it starts, no one knows when it will end. The runs on the regional banks resulted in regulators quickly acting to shore up confidence in the sector by guaranteeing 100 percent of deposits for certain banks. Large privately owned banks also participated in showing a vote of confidence in the banking system by making large deposits totaling $30 billion in First Republic Bank.[1] The recent bank liquidity crisis reflects certain risks that persist in both the banking industry and the securities markets:

1. The velocity with which value/cash can transfer in milliseconds between market participants;
2. The explosive fuel social media adds to that velocity and the associated risks; and
3. Lack of comprehensive regulatory regimes (either within banking or securities regulations) to deal with this extremely troubling dynamic.

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As critical as any input for economic growth is a vibrant banking system and stock market.

During the December 2020 to January 2021 period—highlighted by the extreme volatility on January 28, 2021 (the Meme Stock Day)—the so-called meme stock events (Meme Stock Event) occurred. The event occurred due in large part to the influence of social media and many first-time stock traders entering the market, as indicated in the June 24, 2022, U.S. House Committee on Financial Services (HFSC) memorandum[2] on the meme stocks (HFSC Report).[3]

What Is a Meme Stock?

A meme stock is a stock that gains popularity among retail investors through social media. Of particular note during the Meme Stock Event was the massive surge in the stock price of GameStop, a video game retailer. In January 2021, a group of individual investors from Reddit/WallStreetBets coordinated efforts to drive up the price of GameStop shares. At its peak, GameStop's stock soared to the extraordinary level of $483 per share, exceeding significantly what many analysts considered reasonable based on the company's fundamentals.

Unlike bank regulators that can guarantee deposits or add liquidity to the system, the securities regulators have no such ability. The U.S. Securities and Exchange Commission (SEC) can pass rules and regulations, and enforce such rules and regulations, but it does not have access to funds to try and stop a concerted effort against a broker-dealer. The SEC cannot provide liquidity in the way that the Federal Reserve can. Given that the SEC has fewer tools to head off systemic risk like the Federal Reserve, the SEC should proceed cautiously when it proposes revolutionary changes to the market structure. Its ability to rectify a misstep is much more limited. The HFSC Report even recommended that the SEC and Congress consider funding an emergency backstop facility for National Securities Clearing Corporation (NSCC) member firms.[4] NSCC, which is regulated by the SEC, is the clearing agency for the U.S. equity markets.

During the financial crisis of 2008-2009, some large broker-dealers such as Morgan Stanley and Goldman Sachs had to quickly

form bank-holding companies to access funds provided by the Federal Reserve.[5]

Limited Tools

The Meme Stock Event is like a run on a bank, but the securities regulators have limited—if any—tools to stem the systemic risk. Social media caused a significant run-up in prices of stocks that were widely shorted, such as GameStop (GME), BlackBerry (BB), Bed Bath & Beyond (BBBYQ), and AMC Entertainment Holdings (AMC).

The run-up was preceded by posts on Reddit's WallStreetBets. The frequent posts on WallStreetBets and, in particular by the user called TheRoaringKitty, resulted in numerous stock prices rising significantly. The prices of companies such as GME, BB, BBBYQ, and AMC rose above most expectations and fundamentals. GME stock price went from a closing price $18.84 on December 31, 2020, to an intraday high of $483 on Meme Stock Day, from the previous night's close of $347.51.[6]

It should be noted that on February 26, 2021, when much of the social media posts on GME subsided, GME closed at $101.72, and on May 1, 2023, it closed at $18.55. GME had a stock split on July 21, 2022, the pre-split price would be $74.20. BBBYQ faced significant headwinds in 2021 and recently filed for bankruptcy protection. BBBYQ stock opened at about $19 at the beginning of 2021 and hit a high of $35.30 during the Meme Stock Event. BBBYQ was trading at 24 cents as of late May 2023. Social media clearly had an outsized and unwarranted impact on the prices of the so-called meme stocks. Laying the blame on gamification or digital enhancement practices and payment for order flow (PFOF) appears misplaced and unfounded.

The HFSC Report noted "retail investors trends, like stocks gaining popularity on social media, increasingly affect the pricing and trading volume of securities."[7] SEC Chair Gary Gensler recently stated, "runs, when otherwise uncorrelated actors suddenly become correlated, have brought down many a financial firm over time. Financial fires at banks and nonbanks alike have led policymakers to put in place laws to prevent such fires and associated runs, as well as to help fire departments contain fires."[8]

The brokerage system clears all stocks through the NSCC, a subsidiary of the Depository Trust & Clearing Corporation (DTCC). If a member of the NSCC defaults, it may cease to act for such member, it assumes control of the defaulted members portfolio, and trades and losses are absorbed by collateral posted by the defaulting member and excess losses are borne by the remaining members of NSCC.[9] This could lead to systemic risk and potential failures by other members. Once losses start, it is hard to predict where the domino effect ends.

NSCC maintains a clearing fund into which its member broker-dealers post collateral to protect the NSCC from potential losses from a defaulting member. The clearing fund consists of cash and eligible securities. The collateral required by NSCC is composed of (1) a volatility component (VC), and (2) an excess capital premium (ECP). The VC is the largest component of the collateral collected by NSCC and it is meant to cover the future risk of the cleared portfolio over a given time horizon at a 99 percent confidence level. In addition to the VC, NSCC can charge members an ECP to address a member's significant temporary increase in its required margin.

During the Meme Stock Event that hit its peak on the Meme Stock Day, NSCC called for significant VC and ECPs from a few members. The run-up in prices in stocks such as GME, BB, BBBYQ, and AMC forced the NSCC to call for additional capital immediately from some firms. Some of these firms were caught off guard by the demand for additional capital, which was due overnight or within hours of such a call. NSCC called for $3.7 billion (combined VC and ECP) overnight from Robinhood Securities on Meme Stock Day of which a substantial amount was due to a VC for the increased price of AMC and GME, $850 and $250 million, respectively.[10] This call for extra collateral was significantly reduced the next day by NSCC.[11] The NSCC was concerned with the knock-on effect if it was forced to cease clearing for such firms that had collateral calls, so it reduced the ECP for Robinhood and other brokers.[12]

Firms faced with this immediate request for additional collateral resorted to imposing trading restrictions. The trading restrictions typically limited customers to closing their positions and not opening new positions in highly volatile stocks such as GME, BB, BBBYQ, and AMC. These restrictions are known as position closing orders (PCO). Some firms increased margin requirements for long purchases and short sales.[13] A narrative developed at the time that attributed such trading restrictions to pressure from hedge

funds.[14] However, in congressional testimony, witnesses testified that they imposed trading restrictions due to margin and capital calls from the NSCC.[15] It should be noted that on Meme Stock Day, the New York Stock Exchange and other exchanges imposed numerous trading halts as well.[16]

The Market Access Rule

Securities Exchange Act Rule 15c3-5 (Market Access Rule) requires broker-dealers with market access, or that provide market access to their customers, to appropriately control the risks associated with market access to not jeopardize their own financial condition, that of other market participants, the integrity of trading on the securities markets, and the stability of the financial system. The Market Access Rule applies generally to securities traded on an exchange or an alternative trading system (ATS).[17]

The Market Access Rule requires a broker-dealer to have policies and procedures to monitor risk before sending orders to an exchange or an ATS. In particular, the Market Access Rule requires that financial risk management controls and supervisory procedures be reasonably designed to ensure compliance with all regulatory requirements that are applicable in connection with market access. This includes:

- Preventing the entry of orders that exceed appropriate pre-set credit or capital thresholds in the aggregate for each customer and the broker-dealer; and
- Preventing the entry of erroneous orders, by rejecting orders that exceed appropriate price or size parameters, on an order-by-order basis or over a short period of time, or that indicate duplicative orders.

In addition, the Market Access Rule requires that regulatory risk management controls and supervisory procedures be reasonably designed to ensure compliance with all regulatory requirements that are applicable in connection with market access, including being reasonably designed to:

- Prevent the entry of orders unless there has been compliance with all regulatory requirements that must be satisfied on a pre-order entry basis;

- Prevent the entry of orders for securities that the broker-dealer or customer is restricted from trading;
- Restrict market access technology and systems to authorized persons; and
- Assure appropriate surveillance personnel receive immediate post-trade execution reports.

The Market Access Rule further requires that these risk management controls and supervisory procedures be (1) under the direct and exclusive control of the broker-dealer subject to the obligations (subject to certain limited exceptions), and (2) reviewed regularly for effectiveness.[18]

This rule is intended to prevent a broker-dealer from sending an order to the market, or allowing another to send an order to the market, if it can lead to financial, regulatory or other risks. The financial risk during the Meme Stock Event could have been due to the brokers not having sufficient funds to pay for customer purchases in a cash account or margin account in which a customer's payment is due within one payment period—current T+2 (i.e., Trade Date plus 2 days).[19]

The SEC Meme Stock Report

The SEC Meme Stock Report does not mention the Market Access Rule. Brokers limiting customers to closing open orders was a reasonable and required step for a broker when subjected to the NSCC's demand for additional VC and ECP. It could also be argued that such steps are necessary to comply with the Market Access Rule.

The SEC in its Meme Stock Report stated that it should focus its efforts on what caused brokers to suspend trading. The SEC should be commended for such effort and note that focusing on the combination of social media with the antiquated Margin Rules, fractional shares and market access might be more fruitful than a focus on PFOF. The ability to buy on margin for a fractional share has not been thoroughly studied, like the impact of reporting a fractional share up to one share if less than one share was purchased, has not been studied sufficiently.

The significant run-up in the price of GME on the Meme Stock Day could be due to buying fractional shares on margin and

reporting such purchases as a full share, which distorted the volume of trades. At the peak price of $483 per share that GME hit on Meme Stock Day, an investor, if they had to buy one share, would have to post $241.50 of cash within two business days to comply with the Margin Rule. However, with a fractional share acquisition, a customer can buy $10 worth of GME and post only $5, if the account had more than $2,000 equity (the FINRA minimum for buying on margin). The ability to buy fractional shares on margin may have exacerbated the buying of GME and other meme stocks on Meme Stock Day and other days during the Meme Stock Event. This possibility is not mentioned in the SEC Meme Stock Report. The HFSC Report does discuss fractional shares and the use of margin and concluded that digital enhancement practices, lenient extensions of margin, and increased access to fractional shares allowed retail traders to buy expensive stocks.[20]

It would be prudent to study the impact of fractional shares, trade reporting for fractional shares and margin on the run-up in prices prior to blaming PFOF without evidence and proposing wholesale changes to the U.S. securities market structure. Robinhood lifted its position closing only (PCO) on January 29, 2021, but imposed positional limits and fractional share purchase restriction on approximately 50 names.[21] It should be noted that the current SEC proposal, which would require retail marketable orders to be immediately routed to an exchange auction mechanism (or exchange order book) if not executed at midpoint or better by a wholesale broker-dealer which could reduce, if not eliminate, the incentive for PFOF. This proposed change is going forward even in the face of evidence that retail investors might get a worse execution than the current market structure and that commission-less trading would end.

During the Meme Stock Event, in addition to PCOs, some brokers limited trading by increasing margin requirements to 70 percent and in some cases 100 percent. Some firms limited positions in certain stocks. In addition to brokers limiting positions and NSCC calling for additional collateral, some clearing brokers such as APEX also imposed trading restrictions on its introducing brokers.[22] All of these measures taken together caused an uproar in the media, congressional investigations, and potential precipitous action by the SEC. However, when viewed through the prism of risk management and reducing systemic risk, these measures accomplished their goals like the Federal Reserve does in providing

liquidity and guarantees when banks face a liquidity or confidence crisis. The SEC has market-wide circuit breakers when prices drop precipitously and stock-by-stock circuit breakers for both upward and downward movements in an individual stock price of more than 10 percent in a five-minute period.

However, none of these were effective in curtailing the upward pressure on some stocks during the Meme Stock Event. The HFSC recommended that the SEC consider ways to implement trading halts tailored to concentrated volatility in a limited number of shares.[23] It should be noted that the required margin is still calculated as a fixed percentage (50 percent for equities) of the previous night's closing price, or the current market value and volatility is not factored into the required margin percentages.[24] Federal Reserve Regulation T and self-regulatory organization margin rules allow a broker-dealer to impose more stringent requirements.

The Market Access Rule might have a regulatory gap such that it covers only orders sent to an Exchange or an ATS, but not to a market-maker or wholesaler. So brokers that route all of their orders to market-makers, or wholesalers are not required to comply with the Market Access Rule. However, sound risk policies might require such compliance. This gap could be closed without revolutionary changes to the market structure. The gap in the Market Access Rule is not mentioned in either the SEC Meme Stock Report or the HFSC Report. It should be noted that a market-maker or wholesaler who routes orders to an Exchange or an ATS must comply with the Market Access Rule.

The SEC Meme Stock Report concluded that when share prices change rapidly and brokerage firms suddenly suspend trading, investors may lose money. It should be noted that the trading restrictions (which might have been required to comply with the NSCC's VC and ECP and the Market Access Rule) permitted closing orders and prohibited or limited new orders. Preventing new orders results in a loss of an opportunity, not an actual loss. The entities that lost significant amounts during the Meme Stock Event were the hedge funds that lost $12 billion.[25] Hedge funds may not be a sympathetic class, but the beneficial owners are individuals, pension plans, endowments, and others. So, pensioners and other investors also lost because of the run-up in prices caused by social media influencers promoting acquisitions of stocks that had diminished prospects and fundamentals.

The SEC Meme Stock Report concluded that the SEC should focus on the following four areas:

1. Forces that cause a brokerage to restrict trading. One method to reduce such risk is to shorten the settlement cycle.
2. Digital enhancement practices and PFOF. PFOF creates novel ways to increase customer trading.
3. Trading in dark pools and through wholesalers.
4. Short selling and market dynamics.

Reducing the settlement cycle to one day will decrease the VC of the NSCC collateral requirements but only by 41 percent, according to NSCC.[26] The SEC recently adopted a T+1 settlement cycle, which will become effective on May 28, 2024.[27] There is little—if any—evidence that trading in dark pools and through wholesalers caused or exacerbated the Meme Stock Event. As a matter of fact, Citadel Securities is cited for being able to handle the incredible order flow that occurred during the Meme Stock Event.[28] Industry stakeholders should proceed cautiously when making changes that could impact the liquidity of markets. The current market structure continued to function during the Meme Stock Event in which the market saw historic volume and volatility.[29] The shares trading volume of the major stock markets on January 4, 2021 was 7.5 billion shares. The volume increased to 10.3 billion, 11.5 billion, and 11.7 billion shares on January 26, 27 and 28, 2021, respectively.[30] This represented an increase of 37 percent to 56 percent.

Even before the SEC Meme Stock Report was issued in October 2021, the SEC telegraphed its position on PFOF when Chair Gensler testified before Congress and "criticized the system that funnels orders to Citadel and Virtu, which pay for the opportunity to trade with retail stock and options trades. Chair Gensler said such incentives—called PFOF—represent a conflict of interest for online brokerages, which collectively make billions of dollars a year from the practice. He voiced concern that "the trading firms handling most individual orders control too much of the business."[31] If most retail order routing is restricted to Exchanges and ATSs only, this would reduce competition more than the current market structure. Wholesalers represented approximately 38 percent of the volume, according to Gensler.[32] Forcing this volume to Exchanges and ATSs will dictate concentration into fewer venues. As Gensler

noted, "market concentration can also lead to fragility, deter healthy competition, and limit innovation."[33] If the current market structure proposals are implemented, the industry could see some retail order flows being forced into an untested exchange auction mechanism. How the auction works, if another meme stock event occurs, would be new, untested, and leave little, if any, alternative to handle exponential trading volumes.

The SEC staff wrote in the SEC Meme Stock Report, PFOF may cause broker-dealers to use digital engagement practices, such as gamification, to increase customer trading.[34] The SEC staff's report offers no evidence that PFOF caused the Meme Stock Event. Merely indicating that it *may* not be taken as evidence that PFOF was a cause. It has been more than two years since the Meme Stock Event, PFOF has remained in place, but there has not been a similar Meme Stock Event. It should also be noted that there has not been a similar period of social media posts like the ones posted on Reddit during the Meme Stock Event. Is PFOF a financial fire requiring policymakers to put laws in place to prevent such fires? Or was the fire caused by social media, with PFOF as a means for a broker-dealer to make a profit, similar to charging commissions?

The short squeeze might have exacerbated the Meme Stock Event, but the SEC report stated, "while a short squeeze did not appear to be the main driver of events, and a gamma squeeze less likely, the episode highlights the role and potential impact of short selling and short covering."[35]

The SEC seems to be focused on Digital Enhancement Practices and PFOF. The SEC claims that brokers have an incentive to influence an increase in orders so that they can get paid though PFOF. Brokers get paid either through commissions or PFOF, which is their main source of trading revenue. Thus, the incentive remains for brokers to influence orders even if PFOF is reduced or eliminated.

Merely surmising that brokers' profit motive caused the Meme Stock Event and then propose wholesale changes to the market structure without more empirical proof could lead to harming the markets more than the perceived benefits. Terminating PFOF would also shut out the market to new entrants who may not be able to pay the commissions that will most definitely return. There is little, if any, evidence that brokers were promoting or targeting retail investors to buy the so-called meme stocks.

Terminating PFOF means that the industry will have only one model for brokers to profit—charging commissions. Brokers must make a profit to comply with SEC rules, maintain adequate capital, pay salaries, and, hopefully, pay a return to their stockholders, which include retail investors. The so-called democratization of the markets because of commission-less trades will have to come to an abrupt end. The new market participants that were drawn to the markets by not having to pay commissions may be once again shut out of the securities market.

In addition, because of National Market System regulation, the net price an investor receives when comparing executions with commissions and executions that do not charge commissions, but the routing broker receives PFOF, are almost identical with the difference measured in pennies. Chair Gensler testified before the HFSC on the Meme Stock Event and specifically PFOF stated, "as a result, many Robinhood customers shouldered the costs of inferior executions; these costs *might* have exceeded any savings they might have thought they'd gotten from a zero commission."[36] *Might* have gotten worse execution is not evidence that retail investors are getting a worse execution than investors who pay commissions and certainly not enough to propose wholesale changes to the U.S. equity market structure.

The U.S. stock market is the envy of the world. It offers liquidity, tight spreads, and low costs to trade. The SEC is proposing wholesale and numerous changes to the market structure with little evidence such changes are required. Even the U.S. Department of Justice's Antitrust Unit has warned about the stock market proposals and the potential unintended consequences of four major proposals being implemented at one time.[37]

The SEC's Office of Inspector General in its October 13, 2022, report for the fiscal year that ended September 30, 2022, cautioned the SEC in managing its resources and meeting its regulatory obligations and noted, "in only the first 8 months of 2022 the SEC proposed 26 new rules, which was more than twice as many new rules as proposed the preceding year and more than it had proposed in each of the previous 5 years."[38] To put that in perspective, the volume of rules proposed in the 20-month period ending September 30, 2022, was 37 proposals, while the volume for the full four previous years ending in 2020 were 59 proposals.[39] This breakneck pace is challenging the ability of the SEC to fully vet these proposals and their consequences. During this recent period, the SEC has

seen a significant increase in attrition to its highest rate in 10 years and, most concerning, the attrition in senior officers and attorney positions is expected to be about 20.8 percent and 8.4 percent, respectively, for fiscal year 2022.[40]

Conclusion

Instead of proposing such monumental changes, the industry should study the impact of social media and should look at how decades-old rules such as the margin requirements can be updated to limit leverage in highly volatile stocks and for fractional shares. The margin rules can be updated to include a volatility factor so that a broker cannot lend $240 on GME when it reaches a one-day and multiyear high of $480. Chair Gensler raised the question of the sufficiency of the margin rules when he asked "whether margin and other payment requirements are sufficient."[41] The stock-by-stock circuit breakers can be revised to capture more stocks. The Market Access Rule can be updated to capture orders sent to wholesalers and to the Exchanges or an ATS by a broker. The SEC can use its budget more effectively to educate retail investors, especially about the risk of using leverage during periods of extreme volatility. Are wholesale changes and potentially reducing competition really required for the most liquid and highly sought-after market in the world—a market that has tight spreads, low cost, and incredible liquidity? As the former chief risk officer of the SEC, I have the belief that proceeding cautiously is a less risky proposition.

Notes

* Gabriel Benincasa is a corporate attorney with more than 20 years of experience in senior leadership roles in legal, risk, and compliance in the financial sector. Mr. Benincasa served as the first chief risk officer for the U.S. Securities and Exchange Commission, where he identified, monitored, and mitigated key risks facing the agency and served as a key adviser on other matters such as potential systemic risks to the markets.

1. *See* FDIC Prepares to Place First Republic Under Receivership, Reuters, April 29, 2023.

2. https://financialservices.house.gov/uploadedfiles/memorandum_for_fsc-rs_re_meme_stock_event_final.pdf.

3. https://democrats-financialservices.house.gov/uploadedfiles/6.22_hfsc_gs.report_hmsmeetbp.irm.nlrf.pdf.

4. *See* HFSC Report, page 115.

5. *See* Crisis Put Goldman, Morgan Stanley on Journey into Bankland, S&P Global Market Intelligence, September 13, 2018.

6. *See* SEC Meme Stock Report, page 18, https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf.

7. *See* HFSC Report, page 8.

8. *See* Chair Gensler's Remarks Before the Investment Company Institute, May 25, 2023, https://www.sec.gov/news/speech/gensler-remarks-investment-company-institute-05252023.

9. *See* HFSC Report, page 64.

10. *See id.*, page 52.

11. *See id.*, page 63.

12. *See id.*, page 102.

13. *See id.*, pages 90-91.

14. *See* SEC Meme Stock Report, page 32.

15. *See id.*, page 33.

16. *See* HFSC Report, page 43.

17. *See* Financial Industry Regulatory Authority (FINRA) Rules—Guidance Market Access Rule—Regulatory Obligations and Related Considerations.

18. *See* SEC Responses to Frequently Asked Questions Concerning Risk Management Controls for Broker or Dealers with Market Access, Division of Trading and Markets, April 15, 2014, https://www.sec.gov/divisions/marketreg/faq-15c-5-risk-management-controls-bd.htm.

19. *See* Federal Reserve Board Regulation T (Margin Rule).

20. *See* HFSC Report, page 4.

21. *See* SEC Meme Stock Report, page 33.

22. *See* HFSC Report, page 79.

23. *See id.*, pages 11-12.

24. *See* Margin Rules.

25. *See* "Hedge Funds Rethink Tactics After $12bn Hit from Meme Stock Army," Financial Times, June 25, 2021.

26. *See* NSCC statement in HFSC Report, page 108.

27. *See* SEC Adopts Amendments to Exchange Act Rule 15c6-1.

28. *See* HFSC Report, pages 47-48.

29. *See id.*, page 11.

30. *See* S&P Capital IQ Pro.

31. *See* New SEC Chairman Sets Sights on Citadel Securities and Virtu, Wall Street Journal, May 9, 2021, https://www.wsj.com/articles/new-sec-chairman-sets-sights-on-citadel-securities-and-virtu-11620576000.

32. *See* Gensler HFSC Testimony.

33. *Id.*

34. *See* SEC Meme Stock Report, page 44.

35. *See id.*, page 30.

36. *See* Chair Gensler Testimony Before HFSC, May 6, 2021 (emphasis added).

37. *See* DOJ Antitrust Division Comment Letter, April 11, 2023.

38. OIG Report.

39. *See* OIG Report, page 2.

40. *See id.*, page 21.

41. *See* Gensler HFSC Testimony.

Latin America Likely to Face Continued Robust U.S. Anticorruption Enforcement

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In this article, the authors explain that companies operating in Latin America should reexamine anticorruption best practices and be prepared to act quickly in response to a U.S. government inquiry.

In 2022, nearly 60 percent of the U.S. Department of Justice's (DOJ) Foreign Corrupt Practices Act (FCPA) enforcement actions and more than two-thirds of FCPA-related prosecutions of individuals had connections to Latin America.[1] U.S. regulators have increasingly leveraged ongoing local investigations in Latin America, collaborated with counterparts in the region, relied on a suite of federal statutes to reach non-FCPA conduct, prioritized resources, and incentivized whistleblower reports. Indeed, in fiscal year (FY) 2021, the U.S. Securities and Exchange Commission (SEC) received approximately 169 whistleblower reports originating in Latin America[2] and in FY 2022, the list of foreign countries from which the highest number of tips originated included Mexico and Brazil.[3]

Consequently, companies operating in Latin America should be prepared for continued robust U.S. enforcement activity across the region.

This article summarizes recent U.S. enforcement trends in Latin America and highlights the key drivers for increased investigations and enforcement actions in the region. It also provides practical tips for ensuring compliance teams are prepared and accountable in this environment. Finally, it provides recommendations for companies facing inquiries from U.S. regulators.

Enforcement Activity and Trends in 2022

In 2022, FCPA enforcement actions involved conduct in 12 Latin American countries, with Brazil claiming the top spot as

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the country most frequently implicated in FCPA-related bribery schemes.[4] Table 1 details notable FCPA enforcement actions in the region.

Many of the enforcement actions in the region last year underscore the importance of third-party due diligence and monitoring for companies operating in Latin America.

The DOJ was also active in its prosecution of individuals in the region. In 2022, the DOJ charged 13 individual defendants for FCPA-related violations and all but one were government officials or intermediaries with no direct connection to a public company prosecuted by U.S. authorities.[5]

Continued Robust Enforcement Activity Likely

This year already has ushered in FCPA prosecutions based on conduct in Latin America.[6] This trend is likely to continue for a variety of reasons:

- *Follow-On Investigations*. U.S. enforcement authorities will likely continue to follow collateral leads identified during recent investigations in Latin America as they did in the wake of Lava Jato (Operation Car Wash). There, the sprawling Brazilian investigation of widespread corruption and money laundering at Petrobras led to the DOJ's investigation into Braskem and parent company Obdebrecht S.A., and to a broader industry sweep targeting the construction and infrastructure industries in Brazil and throughout the region. Similarly, the investigations related to Petróleos de Venezuela S.A. (PDVSA) could precipitate a broader industry-wide investigation of the energy sector as well as targeted investigations of PDVSA joint venture partners, or PDVSA-related consortia and their member entities in various countries throughout the region based on evidence developed in related investigations.[7]
- *Supply Chain Relocation from China to Mexico*. With increasing shipping disruptions and geopolitical fracture, exporters from China have begun setting up operations in Mexico to protect their sales to the United States and reduce reliance on factories in Asia. These additional touchpoints will give U.S. regulators more potential investigative

Table 1

Company	Date	U.S. Agency	Penalty	Countries	Conduct
Glencore International A.G.[1]	May 2022	DOJ, (CFTC)	$1.1 billion	Brazil, Venezuela, and various countries in Africa	The government alleged that the company paid nearly $100 million in bribes through intermediaries and other third parties to government officials in seven countries, including Brazil and Venezuela.[2]
Tenaris[3]	June 2022	SEC	$78 million	Brazil	A Brazilian subsidiary of Tenaris allegedly paid $10.4 million in bribes in relation to bids for business from Brazil's state-owned oil entity, Petrobras.
GOL Linhas Aereas Inteligentes S.A.[4]	September 2022	DOJ, SEC	$41 million	Brazil	GOL resolved charges stemming from a scheme to use fraudulent third-party vendor contracts to disguise and pay bribes to officials to secure passage of certain legislation with tax benefits to GOL.
Stericycle Inc.[5]	December 2022	DOJ, SEC	$84 million	Mexico, Argentina, and Brazil	The government alleged that at the direction of executives in its Latin America division, Stericycle employees made bribe payments to officials in Brazil, Mexico, and Argentina to obtain business from government customers. Most of the bribes were allegedly paid in cash through sham third parties.

Company	Date	U.S. Agency	Penalty	Countries	Conduct
UOP LLC, (d/b/a Honeywell UOP)[6]	December 2022	DOJ, SEC	$160 million	Brazil and Algeria	The government alleged that the company conspired to offer a $4 million bribe to a high- ranking official at Petrobras in exchange for contracts and other business advantages.

Notes

1. Press Release, Dep't of Justice, Glencore Entered Guilty Pleas To Foreign Bribery and Market Manipulation Conspiracies (May 24, 2022), https://www.justice.gov/usao-sdny/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-conspiracies.

2. Not included in this summary are the Commodity Futures Trading Commission (CFTC) charges regarding commodity manipulation which involve U.S. domestic conduct.

3. Press Release, SEC, SEC Charges Global Steel Pipe Manufacturer with Violating Foreign Corrupt Practices Act (June 2, 2022), https://www.sec.gov/news/press-release/2022-98.

4. Press Release, Dep't of Justice, GOL Linhas Aéreas Inteligentes S.A. Will Pay Over $41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), https://www.justice.gov/opa/pr/gol-linhas-reas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery; Press Release, SEC, SEC Charges Gol Intelligent Airlines, Brazil's Second Largest Airline, with FCPA Violations (Sept. 15, 2022), https://www.sec.gov/news/press-release/2022-164.

5. Press Release, Dep't of Justice, Stericycle Agrees to Pay Over $84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution; Press Release, SEC, SEC Charges Stericycle with Bribery Schemes in Latin America (Apr. 20, 2022), https://www.sec.gov/news/press-release/2022-65.

6. Press Release, Dep't of Justice, Honeywell UOP to Pay Over $160 Million to Resolve Foreign Bribery Investigations in U.S. and Brazil (Dec. 19, 2022), https://www.justice.gov/opa/pr/honeywell-uop-pay-over-160-million-resolve-foreign-bribery-investigations-us-and-brazil; Press Release, SEC, SEC Charges Honeywell with Bribery Schemes in Algeria and Brazil (Dec. 19, 2022), https://www.sec.gov/news/press-release/2022-230.

fodder in the region. Geopolitical (U.S.-Sino) tensions coupled with increased presence of Chinese companies in Latin America may further incentivize allocation of U.S. enforcement resources to address China's increased presence in the region.

- *Increased Cross-Border Cooperation*. Coordination between U.S. and foreign agencies has become the new normal and is only likely to increase in the post-pandemic landscape. In February 2023, Brazilian President Luiz Inácio Lula da Silva and U.S. President Joseph Biden met in Washington, D.C., and pledged to increase bilateral coordination during a joint appearance.[8] This appearance came on the heels of a year that saw historic levels of cross-border cooperation between U.S. and Brazilian authorities that yielded high-profile settlements in 2022 related to bribery schemes in Brazil and other Latin American countries.[9]

  Recent statements of senior DOJ officials confirm the likelihood of increased cross-border cooperation with Latin American authorities. In a November 2022 speech, DOJ Fraud Section Chief Glenn Leon said that with the pandemic waning, DOJ will seek to "create" law enforcement partnerships in countries where none previously existed.[10]

  For example, on March 5, 2023, a judge in Ecuador approved corruption charges against 37 individuals, including a former Chinese ambassador, over an alleged bribery scheme to win a contract to build a $2.5 billion hydroelectric dam. Ecuador's attorney general reported that prosecutors issued 10 mutual legal assistance requests for evidence to countries including the United States, Switzerland, Belize, Panama, Spain, and China during their investigation, with every country responding except China.[11]

- *Availability of Other U.S. Laws to Buttress Anticorruption Efforts*. The DOJ has increasingly relied on other U.S. criminal laws to reach conduct beyond the purview of the FCPA, such as money laundering or wire and mail fraud. The DOJ now commonly charges the alleged provider of a corrupt payment under the FCPA and the alleged recipient with money laundering violations. For example, of the 13 individuals criminally charged in 2022, only four were charged with substantive FCPA violations.[12]

- *Prioritization of Resources*. DOJ Deputy Attorney General Lisa Monaco announced in September 2022 that the DOJ will request an additional $250 million from Congress to fund corporate crime initiatives in 2023.[13] By way of comparison, the DOJ's entire budget request for FY 2022 for the Criminal Division was $215.2 million.[14] If Congress agrees to fund these corporate crime initiatives, the DOJ will have significantly more resources at its disposal.
- *SEC Whistleblower Program*. Under the SEC's program, whistleblowers are eligible for an award of 10 percent to 30 percent of the aggregate monies any U.S. regulator receives,[15] including non-U.S. individuals. In FY 2022, the SEC paid approximately $229 million in whistleblower awards to 103 individuals.[16] Also in FY 2022, the list of foreign countries from which the highest number of tips originated included Mexico and Brazil.[17]

Tips for Anticorruption Compliance Best Practices

Given the confluence of factors above and the continued focus on Latin America, companies operating in the region should be more attuned than ever to anticorruption compliance best practices in 2023. The DOJ and SEC have issued a number of policy updates and guidance emphasizing the importance of empowered and accountable compliance functions. Given the compliance risks in operating in Latin America, the following tips should inform a review of anticorruption compliance systems. Companies should:

- Reevaluate corporate compliance risks.
- Refresh their corporate compliance programs to ensure that they address new business realities, supply chains, and other post-pandemic changes and consider improvements at regular intervals.
- Ensure that the compliance function is appropriately resourced.
- Focus on training gatekeepers (such as compliance personnel, accounting, finance, and other key personnel) and middle management.
- Update protocols and controls around the use of personal devices and third-party messaging applications based

on recent updates to U.S. enforcement guidance and the prevalence of messaging applications in the region, such as WhatsApp.[18]

- Consider policy additions to recoup or reduce compensation due to compliance violations, policy violations, or misconduct based on recent updates to U.S. enforcement guidance. Relatedly, consider incentives for compliance with policies and reporting obligations.[19]
- Update protocols for responding to whistleblower reports and investigations, and train counsel, senior executives, and appropriate personnel on those protocols.
- Consider creating a crisis response team to communicate with management and coordinate with company counsel and the government. Consider the appropriate composition of the crisis response team, including potentially internal and external counsel, officers and directors of the company, and representatives from key teams, including information technology and public relations.
- Be vigilant about clearly marking all privileged materials to ensure the preservation of applicable legal privileges.
- Understand key information technology (IT) issues, including the location of servers, how and where data are stored, data retention policies and practices, network access capabilities and restrictions, and who is best situated to make immediate changes to routine procedures. Enterprise data access structuring and restrictions are a critical structural component of managing enforcement and collateral litigation risks.

What to Do If the Government Comes Calling

Even companies with a strong code of conduct, an exemplary tone at the top, robust internal controls, and a culture of compliance may still face allegations of misconduct that can lead to government investigations. The following considerations should be top of mind for companies under U.S. regulatory scrutiny:

- *Document Preservation*. Immediately take proactive steps to preserve documents, including from messaging applications, collect and image devices, and modify data retention practices as needed to ensure documents are not destroyed.

- *Retain Outside Counsel*. Consider retaining counsel with experience in DOJ/SEC investigations. Doing so will allow in-house counsel to continue day-to-day responsibilities, provide the company with credibility in the eyes of the government, and bolster the preservation of attorney-client privileges.
- *Preliminary Remediation*. Take immediate steps to ensure improper or illegal conduct has ceased, terminate relationships with any third parties implicated in misconduct, and consider what other remediation might be necessary.
- *Internal Investigation*. Design an appropriately scoped internal investigation plan (document collection and review, witness interviews, internal audit, etc.). This will put the company in the best possible position to understand and control the narrative with regulators.
- *Cooperation*. Companies should weigh several important considerations in determining whether to disclose a potential violation. However, once the U.S. government is involved, companies should consider the financial and reputational benefits of cooperation with U.S. authorities and understand what level of cooperation must be demonstrated for those benefits to be realized. The DOJ recently updated its Corporate Enforcement Policy to further incentivize cooperation even when the company failed to voluntarily disclose a potential violation.[20]
- *Producing Documents*. Prepare to negotiate the scope of document requests and identify potential legal barriers to compliance, such as data privacy laws, blocking statutes, and IT structural restrictions.
- *Government Interviews and/or Investigative Testimony*. Consider which employees to make available for government interviews and prepare them for testimony, including through a thorough review of relevant documents and communications.
- *Disclosure Considerations for U.S. Public Companies and Foreign Private Issuers*. Consider whether disclosure is warranted by assessing the materiality of the investigation, underlying conduct, potential collateral consequences, and potential outcomes. In addition to determining whether to disclose the fact of an investigation, a company should

also consider whether the investigation affects any pending disclosure documents or registration statements.

Key Points

- In 2022, Latin America was a hotbed for FCPA enforcement. As the region feels the ripple effects of recent significant enforcement actions, governments lean into cross-border coordination, and pandemic effects dissipate, FCPA enforcement activity in Latin America is likely to increase into 2023.
- Ongoing local investigations and regulatory enforcement in Latin America could be a precursor for or evidence of U.S. government regulatory action. Companies should not underestimate the collateral consequences of seemingly localized actions that may also create exposure in the United States.

Conclusion

Companies operating in Latin America continue to face unique challenges in managing and mitigating legal exposure in the United States and should expect to remain under the microscope of U.S. regulators. Given this backdrop, companies in the region should focus on implementing robust compliance measures to minimize exposure. They also should implement critical response plans and be prepared to act quickly and nimbly in response to regulator inquiries.

Notes

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1. Stanford Law School Foreign Corrupt Practices Act Clearinghouse, 2022 FCPA Year in Review, https://fcpa.stanford.edu/fcpac-reports/2022-fcpa-year-in-review.pdf.

2. https://www.sec.gov/files/owb-2021-annual-report.pdf.

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6. For example, in February 2023 a grand jury in Connecticut indicted a senior oil trader for a U.S.-based company and a foreign national from Brazil for antibribery violations of the FCPA and money-laundering charges in connection with a scheme to pay bribes to government officials in Brazil to win contracts with Brazil's state-owned oil company, Petrobras. *See* Press Release, Dep't of Justice, Senior Oil and Gas Trader and Brazil-Based Intermediary Charged in Bribery and Money Laundering Scheme (Feb. 17, 2023), https://www.justice.gov/opa/pr/senior-oil-and-gas-trader-and-brazil-based-intermediary-charged-bribery-and-money-laundering.

7. For example, in December 2022, the DOJ filed a superseding indictment against Javier Aguilar, a trader at the U.S. subsidiary of European oil trading company Vitol, accusing him of paying bribes in Mexico in addition to a previously alleged bribery scheme in which Aguilar is accused of bribing officials at the state oil company of Ecuador to secure a $300 million contract. *See* Superseding Indictment, United States v. Aguilar, No. 20-CR-00390 (E.D.N.Y. Dec. 2, 2022), https://www.justice.gov/criminal-fraud/file/1556516/download.

8. Statements and Releases, The White House, Joint Statement Following the Meeting Between President Biden and President Lula (Feb. 10, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/10/joint-statement-following-the-meeting-between-president-biden-and-president-lula/.

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18. https://www.justice.gov/criminal-fraud/page/file/937501/download.

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