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China Practice Newsletter

Holland & Knight is a U.S.-based global law firm committed to provide high-quality legal services to our clients. We provide legal assistance to Chinese investors and companies doing business or making investments in the United States and Latin America. We also advise and assist multinational corporations and financial institutions, trade associations, private investors and other clients in their China-related activities. With more than 1,700 professionals in 32 offices, our lawyers and professionals are experienced in all of the interdisciplinary areas necessary to guide clients through the opportunities and challenges that arise throughout the business or investment life cycles.

We assist Chinese clients and multinational clients in their China-related activities in areas such as international business, mergers and acquisitions, technology, oil and energy, healthcare, real estate, environmental law, private equity, venture capital, financial services, taxation, intellectual property, private wealth services, data privacy and cybersecurity, labor and employment, ESOPs, regulatory and government affairs, and dispute resolutions.

We invite you to read our China Practice Newsletter, in which our authors discuss pertinent Sino-American topics. We also welcome you to discuss your thoughts on this issue with our authors listed within the document.

霍兰德奈特律师事务所是一家位于美国的全球性法律事务所，我们致力于向客户提供高质量的法律服务。我们向在美国及拉丁美洲进行商业活动或投资的中国投资人及公司提供他们所需的各类法律协助。我们也向跨国公司、金融机构、贸易机构、投资人及其他客户提供他们于其与中国相关活动中所需的咨询和协助。我们在 32 个办公室的 1700 多名对各领域有经验的律师及专业人员能够协助客户处理他们在经营或投资过程中所遇到的各种机会及挑战。

我们向中国客户及从事与中国有关活动的跨国客户提供法律协助的领域包括国际商业、企业并购、科技法律、石油及能源、医疗法律、房地产、环保法律、私募基金、创投基金、金融法律服务、税务、知识产权、私人财富管理法律服务、信息隐私及网络安全、劳动及雇佣法律、员工持股计划、法令遵循及政府法规、及争议解决。

我们邀请您阅读刊载我们各作者就与中美有关的各议题所作论述的 China Practice 期刊。我们也欢迎您向本期刊的各作者提供您对各相关议题的看法。

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5 Key Takeaways from the 2022 Inaugural CFIUS Conference

By Antonia I. Tzinova, Robert A. Friedman, Ronald A. Oleynik, Andrew K. McAllister, Mackenzie A. Zales, Devin M. Sullivan and Sarah K. Hubner

HIGHLIGHTS

- The Committee on Foreign Investment in the United States (CFIUS) hosted its Inaugural Conference on June 16, 2022. The event was a first of its kind and offered a rare glimpse inside the Committee's investment review process and key areas of current national security concerns, as well as a preview of CFIUS enforcement priorities.
- The conference featured speakers – both lawyers and policymakers – from a variety of CFIUS member agencies who provided remarks on key issues that CFIUS is facing, strategies for parties involved in the CFIUS process and best practices for engaging the Committee.
- Holland & Knight has identified five key takeaways from the conference for dealmakers to consider in cross-border transactions that entail foreign investment in, or the acquisition of, U.S. businesses.

The interagency Committee on Foreign Investment in the United States (CFIUS or the Committee) hosted its 2022 Inaugural Conference on June 16, 2022. In its capacity as chair of CFIUS, the U.S. Department of the Treasury spearheaded the conference, with speakers from several CFIUS member agencies[1], including the U.S. Departments of Commerce, Justice, Defense, Homeland Security, State and the Office of the Director of National Intelligence. The conference provided a rare glimpse into key areas of concern in the recent work of the Committee. It also served as a platform to express the U.S. government's commitment to an open and strong investment environment welcoming to foreign investors.

Commentary focused on a variety of topics pertaining to the Committee's review processes, CFIUS monitoring and enforcement, and the emerging national security risk landscape. Additionally, speakers offered advice and recommendations to attendees on best practices for cooperating with CFIUS to achieve mutually desired outcomes.

Holland & Knight has identified five key takeaways from the CFIUS Conference, discussed in detail below. Decision-makers should consider these takeaways when pursuing transactions involving foreign investment in the U.S.

1. NATIONAL SECURITY IS A SHARED RESPONSIBILITY

The conference reaffirmed the role of CFIUS in the U.S. national security landscape: CFIUS aims to strengthen the U.S. market and make it attractive for foreign investment. Thus, protecting U.S. national security, and by extension the operations of CFIUS, is meant to be a shared responsibility between the U.S. government and the private sector. The cooperative nature of the Committee was likewise highlighted by speakers across various other panels.

Consistent with a shared responsibility to protect national security, several speakers emphasized that the CFIUS review process is not meant to be adversarial. Instead, they recommend that parties engage with CFIUS early and actively. This includes communicating with relevant agencies at the onset of a transaction

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to determine whether CFIUS has jurisdiction and to outline what potential national security risks may exist. By operating as active participants and providing the Committee with comprehensive and timely responses to inquiries, businesses and the CFIUS bar can avoid unnecessary complications in the review process.

2. BIG DATA IS A CRITICAL ELEMENT OF THE EVOLVING RISK LANDSCAPE

With the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA),[2] CFIUS jurisdiction was expanded to review certain non-controlling foreign investments in U.S. businesses involved in critical technologies, critical infrastructure or sensitive personal data (TID U.S. businesses). This codified a developing concern that CFIUS has had in recent years with respect to sensitive personal data as an area of heightened national security risk, particularly in transactions that involve historically "high-risk" countries such as China. Though the CFIUS regulations contain a defined list of "sensitive personal data" categories subject to non-controlling investment review, speakers at the conference also focused more broadly on controlling investments in companies that collect other types of personal data, such as e-commerce spending habits.

Speakers remarked that big data is becoming a major driver of the global economy and international security, and is, thus, of growing concern to CFIUS. Notably, CFIUS officials shared that more types of data are now considered high-risk. In particular, there is an increased focus on genetic and medical data that both are and are not protected under the Health Insurance Portability and Accountability Act (HIPAA). New research was cited suggesting that de-identified or anonymized data may no longer be viewed as a sufficient data security measure, especially as anonymized data becomes less and less secure. It seems likely that "sensitive personal data" categories will serve as a floor and not a ceiling when it comes to areas of regulatory scrutiny, and that any U.S. business that collects or stores personal data of U.S. nationals – including software and software as a service (SaaS) companies, media and digital advertising companies, fintech, health and biotech companies, and a diverse variety of other technology companies – will need to closely review the nature and scope of data practices when considering foreign investors or foreign acquirers.

3. CFIUS CONTINUES TO EXPAND REVIEW OF NON-NOTIFIED TRANSACTIONS

The conference also focused on the exponential increase in the resources dedicated to the identification of non-notified transactions. Speakers emphasized that, since the enactment of FIRRMA, the Committee has continued to expand resources to identify and review non-notified transactions. At the same time, CFIUS officials did note that typically non-notified transactions are referred to CFIUS by other agencies. CFIUS also learns of transactions through the media, SEC filings and tips from the public. Requests for information from CFIUS regarding non-notified transactions are not meant to be antagonistic, speakers said. As a first step, they aim to confirm whether the Committee has jurisdiction. Even though not required, parties are encouraged to provide relevant information for the CFIUS risk assessment analysis. Speakers emphasized that the majority of non-notified inquiries do not result in a request for a formal filing and that it is key to provide CFIUS with prompt responses for the benefit of the business and the Committee.

Parties to a foreign investment transaction should be aware of CFIUS efforts to identify non-notified transactions. There is no statute of limitations for CFIUS jurisdiction over non-notified transactions. CFIUS officials confirmed Holland & Knight's recommended best practice: conducting a CFIUS analysis and risk assessment is now a *de facto* requirement in every foreign investment transaction.

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4. MITIGATION AND ENFORCEMENT REMAIN A HIGH PRIORITY

It was reported that approximately 10 percent of CFIUS-notified transactions result in mitigation measures.[3] Importantly, the Committee made clear that declarations (the shorter form of filing) cannot be used as a vehicle for mitigation. If the transaction is proceeding to mitigation, the parties will be required to file a notice.

Notably, the majority of mitigation agreements are open ended in terms of timing. However, CFIUS periodically reevaluates mitigation measures to ensure that mitigation agreements reflect the current national security risk environment. The Committee stressed that operational personnel of the U.S. business should be involved in the negotiation of mitigation measures to ensure that the company is able to implement and comply with the restrictions and reporting requirements.

Speakers emphasized that, for the most part, enforcement actions are not intended to be punitive, and that any penalties are 1) proportionate to the violation and 2) aimed at incentivizing prospective compliance – both for the violator and for other companies subject to mitigation. When determining what penalties are appropriate for violations, the Committee will consider several factors, including but not limited to: the timing and persistence of the violation, the nature and intent of the misconduct, and the violator's history of compliance. (These factors are quite similar to those used in enforcement actions with respect to U.S. export controls and sanctions laws.) Consistent with wider messaging at the Conference, CFIUS officials highlighted the importance of open communication with the Committee, particularly as it pertains to self-reporting any breaches to mitigation agreements.

5. STRATEGIC FILING DECISIONS SHOULD BE MADE IN LIGHT OF TIMELINE CONSTRAINTS IN THE DECLARATION PROCESS

Although the use of the short-form declaration process has increased (CFIUS reported that the declaration clearance rate for 2021 was approximately 73 percent), several factors should be considered when deciding whether to file a declaration or a traditional, full voluntary notice with CFIUS, including the complexity of the transaction, any U.S. government contracts held by the U.S. business and prior CFIUS clearance of the foreign acquirer/investor. Speakers cautioned against the overuse of the declaration process and recommended that conference attendees be mindful of the strategic advantages and disadvantages of filing a declaration. Though the declaration process offers benefits for seemingly low-risk transactions (e.g., speed, cost), it can often be difficult to successfully address national security concerns within the 30-day review timeline for declarations, and the transaction could end up with a full notice, eliminating many of the perceived benefits of pursuing a declaration. In light of these constraints, conference speakers advised parties to consider potential risks posed by the transaction – namely the home country of the investor, the sector and operations of the U.S. target business, and the complexity of the transaction.

CONCLUSION

The Inaugural CFIUS Conference reaffirmed the evolving nature of national security concerns in foreign investment transactions but also the U.S. commitment to an open investment environment. FIRRMA has brought CFIUS to the forefront of any cross-border transaction and is now a *de facto* requirement in the due diligence process. Determining CFIUS jurisdiction and risk factors and engaging the Committee early on are best practices for protecting the investment.

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The Inaugural Conference was a statement that CFIUS is open and willing to work with the parties and the CFIUS bar on protecting U.S. national security while ensuring an open and stable investment environment. If you have any questions about this trade alert or need assistance navigating the CFIUS process, reach out to the authors or another member of Holland & Knight's International Trade Group.

Notes

[1] CFIUS includes nine active members (the U.S. Departments of the Treasury (chair), Justice, Homeland Security, Commerce, Defense, State, Energy, Office of the U.S. Trade Representative, and Office of Science and Technology Policy) and six observers (Office of Management and Budget, Council Economic Advisors, National Security Council, National Economic Council and Homeland Security Council). Additionally, the Office of the Director of National Intelligence and the U.S. Department of Labor are non-voting, ex-officio members.

[2] For more information on the passing and subsequent enactment of FIRRMA see previous Holland & Knight alerts: "FIRRMA Expands CFIUS Jurisdiction in 2 Major Ways" (Aug. 16, 2018) and "New CFIUS Regulations Finally Take Effect" (Feb. 13, 2020).

[3] There are currently less than 200 mitigation agreements.

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2022 年美国外国投资委员会首次大会的五大要点

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重點摘要

- 美国外国投资委员会（CFIUS）于 2022 年 6 月 16 日主办了其首次大会。这是第一次此类活动，为委员会的投资审查过程和当前国家安全关注的关键领域提供了难得的瞥视机会，并预览了 CFIUS 的执法重点。
- 本次会议由来自 CFIUS 各成员机构的律师和决策者组成，他们就 CFIUS 面临的关键问题、参与 CFIUS 流程的各方的战略以及与委员会互动的最佳做法发表了评论。
- Holland & Knight 从会议中发现了五个关键要点，供交易方在涉及外国投资或收购美国企业的跨境交易中考虑。

跨部门的美国外国投资委员会（CFIUS 或该委员会）于 2022 年 6 月 16 日主办了 2022 年首次大会。美国财政部以 CFIUS 主席的身份率先主持了会议，来自 CFIUS 多个成员机构，[1] 包括美国商务部、司法部、国防部、国土安全部、国务院和国家情报局长办公室的主讲人参与了会议。会议对委员会最近工作中的主要关切领域提供难得的瞥视机会。它还作为一个平台，表达了美国政府对开放和强大的投资环境的承诺，欢迎外国投资者。

评论集中在与委员会的审查过程、美国外国投资委员会的监管和执行的活动、以及新出现的国家安全风险环境有关的各种议题上。此外，发言者就与外国投资委员会合作以实现共同期望的结果的最佳做法向与会者提供了建言和建议。

Holland & Knight 从 CFIUS 会议中发现了五个关键要点，详细讨论如下。决策者在美国进行涉及外国投资的交易时应考虑这些要点。

1. 国家安全是共同的责任

会议重申了外国投资委员会在美国国家安全格局中的作用：外国投资委员会旨在加强美国市场，使其对外国投资具有吸引力。因此，保护美国国家安全，进而保护外国投资委员会的运作，是美国政府和私营部门的共同责任。其他各小组的发言者也同样强调了委员会的合作性质。

与保护国家安全的共同责任相一致，几位发言者强调，美国外国投资委员会的审查过程并非对抗性的。相反地，他们建议各方尽早和积极地与 CFIUS 接触。这包括在交易开始时与相关机构沟通，以确定 CFIUS 是否具有管辖权，并概述可能存在的潜在国家安全风险。企业和处理 CFIUS 事务的律师作为积极参与者开展工作，并向委员会提供全面、及时的查询回复，可以避免审查过程中不必要的复杂情况。

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2. 大数据是不断变化的风险格局的关键要素

随着《2018 年外国投资风险审查现代化法案》（FIRRMA）的颁布，[2] CFIUS 的管辖范围扩大到审查涉及关键技术、关键基础设施或敏感个人数据的美国企业（TID 美国企业）中的某些非控制性外国投资。这就形成了美国外国投资委员会近年来对敏感个人数据的日益担忧，因为敏感个人数据是国家安全风险加剧的一个领域，尤其是在涉及中国等向来被归类为“高风险”国家的交易中。尽管美国外国投资委员会（CFIUS）的规定包含了一份受非控制性投资审查约束的“敏感个人数据”类别的定义清单，但会议上的发言者还更广泛地关注了对收集其他类型个人数据（如电子商务支出习惯）的公司的控制性投资。

发言者表示，大数据正在成为全球经济和国际安全的主要驱动力，因此，CFIUS 越来越关注大数据。值得注意的是，美国外国投资委员会官员表示，现在有更多类型的数据被视为高风险数据。特别是，人们越来越关注《健康保险可携带性和责任法案》（HIPAA）保护和未保护的遗传和医疗数据。引用的新研究表明，取消识别或匿名数据可能不再被视为足够的数据安全措施，尤其是在匿名数据变得越来越不安全的情况下。当涉及监管审查领域时，“敏感个人数据”类别似乎将作为下限而不是上限，而任何收集或存储美国国民个人数据的美国企业——包括软件和软件服务（SaaS）公司、媒体和数字广告公司、金融科技、健康和生物科技公司，以及各种各样的其他技术公司——在考虑外国投资者或外国收购者时，需要仔细审查数据实践的性质和范围。

3. CFIUS 继续扩大对未通知交易的审查

会议还重点讨论了用于识别未通知交易的资源的越来越快的增长。发言者强调，自《2018 年外国投资风险审查现代化法案》（FIRRMA）颁布以来，委员会继续扩大资源，以确定和审查未通知的交易。同时，CFIUS 官员确实注意到，通常未通知的交易由其他机构提交给 CFIUS。CFIUS 还通过媒体、SEC 文件和公众提示了解交易情况。发言人说，美国外国投资委员会要求提供有关未通知交易的信息并不意味着具有对抗性。作为第一步，他们旨在确认委员会是否拥有管辖权。尽管没有要求，但鼓励各方向美国外国投资委员会提供相关信息做为风险评估分析。发言者强调，大多数对未通知交易的调查不会导致正式备案请求，为了企业和委员会的利益，向 CFIUS 提供及时回复是关键。

外国投资交易各方应了解 CFIUS 为识别未通知交易所做的努力。CFIUS 对未通知交易的管辖权没有法定时效。CFIUS 官员确认了 Holland & Knight 推荐的最佳实践：即对每一笔外国投资交易进行 CFIUS 分析和风险评估已*实际上*成为一项要求。

4. 缓解和执行仍然是高度优先事项

据报道，CFIUS 通知的交易中约有 10%会采取缓解措施。[3] 重要的是，委员会明确指出，申报（备案的较短形式）不能用作缓解措施。如果交易正在进行缓解，各方将被要求提交通知。

值得注意的是，大多数缓解协议在时间上是开放式的。然而，美国外国投资委员会定期重新评估缓解措施，以确保缓解协议反映当前的国家安全风险环境。委员会强调，美国企业的运营人员应参与缓解措施的谈判，以确保公司能够实施并遵守限制和报告要求。

发言者强调，在很大程度上，执法行动不是为了惩罚性的，且任何处罚 1）与违规行为成比例，2）旨在鼓励未来的合规——无论是对违规者还是其他需要缓解的公司。在确定哪些处罚适合违规时，委员会将考虑几个因素，包括但不限于：违规的时间和持续性、不当行为的性质和意图，以及违规者的合规历史。（这些因素与美国出口管制和制裁法执法行动中使用的因素非常相似。）与会议上更广泛的信息一致，美国外国投资委员会官员强调了与委员会公开沟通的重要性，特别是在自我报告任何违反缓解协议的行为方面。

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5. 应根据申报过程中的时间限制作出战略申报决定

虽然简式申报流程的使用有所增加（美国外国投资委员会报告称，2021 的申报通过率约为 73%），但在决定是否向美国外国投资委员提交申报或传统的完全自愿通知时，应考虑几个因素，包括交易的复杂性，美国企业持有的任何美国政府合同以及外国收购人/投资者的 CFIUS 事先许可。发言者告诫不要过度使用申报程序，并建议与会者注意申报的战略优势和劣势。虽然申报过程为看似低风险的交易（例如速度、成本）提供了好处，但通常很难在 30 天的申报审查时间表内成功解决国家安全问题，交易最终可能需作完整通知，从而消除了许多寻求进行申报所认为的好处。鉴于这些限制，会议发言人建议各方考虑交易带来的潜在风险，即投资者的母国、美国目标业务的部门和运营以及交易的复杂性。

结论

美国外国投资委员会首次会议重申了外国投资交易中国家安全问题的演变性质，同时也重申了美国对开放投资环境的承诺。FIRRMA 将 CFIUS 带到了任何跨境交易的前沿，现在已成为尽职调查过程中的事实要求。确定美国外国投资委员会的管辖权和风险因素，并尽早与委员会接触，是保护投资的最佳做法。

首次大会发表声明称，美国外国投资委员会持开放态度，愿意与各方和美国外国投资委员协会合作，保护美国国家安全，同时确保开放稳定的投资环境。如果您对本贸易提示文章有任何疑问或需要在 CFIUS 流程中获得帮助，请联系作者或 Holland & Knight 的国际贸易法律业务团队的其他成员。

附注

[1] CFIUS 包括九名活跃成员（美国财政部（主席）、司法部、国土安全部、商业部、国防部、国务院、能源部、美国贸易代表办公室和科学技术政策办公室）和六名观察员（管理和预算办公室、委员会经济顾问、国家安全委员会、国家经济委员会和国土安全委员会）。此外，国家情报局长办公室和美国劳工部是无投票权的当然成员。

[2] 有关 FIRRMA 的通过和随后颁布的更多信息，请参阅之前的 Holland & Knight 提示文章：“FIRRMA 在两个主要方面扩大了 CFIUS 的管辖权”（2018 年 8 月 16 日）和“新的 CFIUS 条例最终生效”（2020 年 2 月 13 日）。

[3] 目前只有不到 200 份缓解协议。

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Let's Talk Cryptocurrencies and "Digital Assets": A Primer for Trust and Estate Lawyers

By Jaime B. Herren and Robert Barton

HIGHLIGHTS

- By now, nearly everyone knows that cryptocurrency is digital money and cryptocurrency transactions are recorded in secure digital ledgers known as blockchains. But that doesn't even scratch the surface of this robust technology.
- Most cryptocurrencies have their own whitepapers, stories and lingo. That means, on top of being a disruptive technology, the crypto ecosystem presents a learning curve to even the most willing and engaged investors.
- Digital assets will soon become a common part of the client's portfolio. As a result, trust and estate lawyers must become at least generally familiar with the various types of digital assets in order to competently advise their clients.

By now, nearly everyone knows that cryptocurrency is digital money and cryptocurrency transactions are recorded in secure digital ledgers known as blockchains. But that doesn't even scratch the surface of this robust technology.

Since the bitcoin network came into existence in 2008, thousands of new digital assets have emerged. These include coins, tokens, tethered currency, non-fungible tokens (NFTs), as well as other cryptography-based mediums of currency. Most cryptocurrencies have their own whitepapers, stories and lingo. That means, on top of being a disruptive technology, the crypto ecosystem presents a learning curve to even the most willing and engaged investors. Typically, at an initial coin offering (ICO), the whitepaper is released by the developer for the purpose of providing technical information on the technology, purpose and marketplace considerations. The whitepapers contain the details that distinguish one crypto-project from another and define how each new digital asset is designed to solve a problem and/or fit into the marketplace.

Of course, just as you don't need a degree in finance to bank, you don't need to read the whitepapers to invest in digital assets. Digital asset owners range from tech-savvy miners to everyday investor.

DEFINING "DIGITAL ASSETS": EXECUTIVE ORDER ON ENSURING RESPONSIBLE DEVELOPMENT OF DIGITAL ASSETS

On March 9, 2022, President Joe Biden issued his Executive Order on Ensuring Responsible Development of Digital Assets (the Order). It sets policy for advancing digital blockchain technology for financial services. The Order states: "The United States has an interest in responsible financial innovation, expanding access to safe and affordable financial service and reducing the cost of domestic and cross-border funds transfers and payments, including through the continued modernization of public payment systems." The Order includes useful definitions that will be applicable to trust and estate practitioners.

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As set forth in the Order, the term "digital assets" is the umbrella term that refers to all cryptography-based assets – regardless of the technology used – that are issued in digital form through the use of blockchain technology.[1] For example, digital assets include cryptocurrencies, stablecoins and CBDCs. What are those? The Order defines each of them.

- The term "cryptocurrencies" refers to a type of digital asset, which may be a medium of exchange, for which ownership is recorded with a blockchain or similar distributed ledger technology that relies on cryptography.[2]
- The term "stablecoins" refers to a category of cryptocurrencies with mechanisms aimed at maintaining a stable value.[3] Stabilized value is accomplished, for example, by pegging the value of a coin to a specific currency/asset or by algorithmically controlling supply in response to changes in demand. Stablecoins are sometimes referred to as being tethered to a conventional fiat currency (i.e., the U.S. dollar) or other stablizing asset.
- The term "central bank digital currency" (CBDC) refers to the official digital money of a nation that is a direct liability of that nation's central bank.[4]

The Order directs multiple U.S. departments and agencies to act with the "highest urgency" to collaboratively conduct research and development on design and deployment options for a United States CBDC.[5] The first round of reports are due to President Biden on Sept. 5, 2022, with further research and development efforts continuing for many months thereafter.[6] By all accounts, the Order is a bold indication that the U.S. recognizes that blockchain technology, cryptocurrency and all digital assets are here to stay in both domestic and global financial systems.

UNDERSTANDING OWNERSHIP OF DIGITAL ASSETS

At the inception of cryptocurrency, direct token ownership (i.e., via private key) and mining (i.e., participating in peer-to-peer validation of blockchain transactions in exchange for tokens) were the most common ways to own digital assets. However, these are no longer the primary means of acquiring digital assets. Now, anyone with access to a computer or smartphone can download a wallet and invest in digital assets. That means that trust and estate lawyers need to take conscious steps to confirm whether an individual owns any digital assets and to plan accordingly.

Traditional means of investing are also available for cryptocurrencies and becoming more widely available, including for retirement plans. All varieties of coins, tokens, tethered currency, NFTs and other digital assets are becoming more well-known, backed and regulated. While some are still highly volatile and represent a risky investment, others are almost colloquial and an accepted assets class among investors.

For these reasons, digital assets will soon become a common part of the client's portfolio. As a result, trust and estate lawyers must become at least generally familiar with these types of digital assets in order to competently advise their clients.

UNDERSTANDING THE TRANSFER OF DIGITAL ASSETS

The primary function of cryptography is security and is the backbone of blockchain. Transfer of encrypted assets, such as cryptocurrencies, without the owner's consent, is well obstructed. The robustness of blockchain security is memorialized in the phase "Not your keys, not your coins." In fact, blockchain is considered such a robust security technology that it is beginning to be utilized in many industries outside of finance.

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Because of its highly secure nature, transfer of digital assets to heirs after the owner's death can be extremely complicated, if not well-planned for in advance. For example, identifying digital assets on an assets schedule attached to an estate plan can be insufficient, without more. While identification is a start, actual transfer of digital assets at death requires logistical considerations of cryptography and the owner's particular holding solution.

Different digital assets have different wallet solutions. If you hold digital assets and your estate planner does not know the difference between cold, warm and hot wallets, the likelihood of a successful transfer of these types of assets to your heirs is not very good. Stories about millions of dollars in lost or inaccessible cryptocurrency are now commonplace, often involving private keys held in cold wallets, without a backup plan or transfer of knowledge at the owner's death. While cold wallets represent excellent security during life, they also represent difficulty at death and require particularized planning.

ESTATE PLANNING FOR DIGITAL ASSETS

Creative transfer solutions exist and may, in some cases, be required. Digital assets can be administered through a trust or estate if it is done in a manner that ensures that the private keys can be securely accessed at the right time by the right person. Unlike transfers from traditional bank accounts, where financial institutions are insured and provide additional oversight, a mistaken or unauthorized transfer of digital assets is nearly impossible to recover.

A sophisticated estate planner can ensure that a trust expressly empowers your trustee to access, retain and manage digital assets however they are held. Each is a separate power that needs to be expressly given to the trustee and some jurisdictions are more crypto-friendly than others. A savvy estate planner can advise on options such as cold storage, key custodians, special trustees and appropriate situs.

In addition, it is worth considering that not all "traditional" trustees, such as trust companies and private professional fiduciaries, will be willing to serve as trustee for digital assets, whether it be because of an unfamiliarity with the technology, or because of the volatility of the asset class. As such, special consideration needs to be paid to trustee selection, including confirming that the selected institution has the expertise and willingness to administer digital assets.

Hot wallets (also known as crypto exchanges) have different rules and regulations are in the infancy stages. Some exchanges allow trusts to own assets and some do not. Depending on the particular digital asset at issue, the owner may not be able to fund it into a trust by traditional means. In addition, for some of these digital assets, the asset class is so new that no consideration has been given to post-death transfer. As a result, determining the particular asset transfer process can be cumbersome. But, failing to plan for transfer to heirs can easily result in loss of wealth that would have otherwise passed on to beneficiaries.

While crypto communities bring some flair to finance, the endeavor is to build real, solid and secure financial tools. Ownership of complex assets calls for sophisticated and knowledgeable planning.

For more information on handling digital assists within your trusts, estates and portfolio, contact the author or another member of Holland & Knight's Private Wealth Services Digital Assets Team.

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Notes

[1] Executive Order, Sec. 9 (d)

[2] Executive Order, Sec. 9 (c)

[3] Executive Order, Sec. 9 (e)

[4] Executive Order, Sec. 9 (b)

[5] Executive Order, Sec. 4 (a) (i)

[6] Executive Order, Sec. 4 (b) and (d), Sec. 5 (b), Sec. 6-7

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让我们谈谈加密货币和“数字资产”：信托和财产规划律师入门

原文作者：Jaime B. Herren 和 Robert Barton

重點摘要

- 到现在，几乎所有人都知道加密货币是数字货币，且加密货币交易记录在称为区块链的安全数字账本中了。但这甚至没有触及这项强大技术的表层。
- 大多数加密货币都有自己的白皮书、故事和行话。这意味着，加密生态系统除了是一种颠覆性技术外，甚至对最愿意和最投入的投资者来说，也是一条学习曲线。
- 数字资产将很快成为客户投资组合中的常见部分。因此，信托和财产规划律师必须至少大致熟悉各种类型的数字资产，才能胜任地为其客户提供建议。

到现在，几乎所有人都知道加密货币是数字货币，且加密货币交易记录在称为区块链的安全数字账本中了。但这甚至没有触及这项强大技术的表层。

自 2008 年比特币网络问世以来，出现了数千种新的数字资产。这些包括硬币、代币、栓系货币、不可替代代币（NFT）以及其他基于密码的货币工具。大多数加密货币都有自己的白皮书、故事和行话。这意味着，加密生态系统除了是一种颠覆性技术外，甚至对最愿意和最投入的投资者来说，也会是一条学习曲线。通常，在首次硬币发行（ICO）时，开发者发布白皮书的目的是提供有关技术、目的和市场考量的技术信息。白皮书包含了区分不同加密项目的细节，并定义了如何设计每个新的数字资产来解决问题和/或融入市场。

当然，正如你不需要银行金融学位一样，你也不需要阅读白皮书来投资数字资产。数字资产所有者包括精通技术的挖矿人到一般投资人。

定义“数字资产”：关于确保负责任地开发数字资产的行政命令

2022 年 3 月 9 日，拜登总统发布了关于确保负责任地开发数字资产的行政命令（该行政命令）。它制定了促进金融服务数字区块链技术的政策。该行政命令指出：“美国有兴趣进行负责任的金融创新，扩大获得安全和负担得起的金融服务的机会，降低国内和跨境资金转移和支付的成本，包括通过公共支付系统的持续现代化。”该行政命令包括适用于信托和财产规划从业人员的有用定义。

如该行政命令中所述，“数字资产”一总括术语是指通过使用区块链技术以数字形式发行的所有基于密码的资产（无论使用何种技术）。[1] 例如，数字资产包括加密货币、稳定币（stablecoins） 和 CBDC。那些是什么？该行政命令对每一个做出定义。

- “加密货币”一词是指一种数字资产，可能是一种交换工具，其所有权通过依赖加密的区块链或类似分布式账本技术记录。[2]
- “稳定币（stablecoins）”一词是指一类加密货币，其机制旨在维持稳定的价值。[3] 例如，通过将硬币的价值与特定货币/资产挂钩，或通过算法控制供应以响应需求变化，实现稳定价值。Stablecoins 有时被称为与传统法定货币（即美元）或其他稳定资产挂钩。

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- “中央银行数字货币”一词（CBDC）是指一个国家的官方数字货币，是该国中央银行的直接负债。[4]

该行政命令指示多个美国部门和机构“最紧急”地采取行动，共同研究和开发美国 CBDC 的设计和部署选项。[5] 第一轮报告将于 2022 年 9 月 5 日提交给拜登总统，此后数月将继续进行进一步的研究和开发工作。[6] 所有的人都认为，该行政命令是一个大胆的迹象，表明美国认识到区块链技术、加密货币和所有数字资产将继续在国内和全球金融系统中发展。

了解数字资产的所有权

在加密货币诞生之初，直接令牌所有权（即通过私钥）和挖掘（即参与区块链交易的对等验证以交换令牌）是拥有数字资产的最常见方式。然而，这些不再是获取数字资产的主要手段。现在，任何可以使用电脑或智能手机的人都可以下载钱包并投资数字资产。这意味着信托和财产规划律师需要采取有意识的措施，确认个人是否拥有任何数字资产，并进行相应的规划。

加密货币也提供了传统的投资手段，并且变得越来越广泛，包括退休计划。各种各样的硬币、代币、栓系货币、NFT 和其他数字资产正变得越来越知名、受到支持和监管。虽然有些资产仍是高度波动并为危险的投资，其他有些几乎是不正式的且是投资者公认的资产类别。

由于这些原因，数字资产将很快成为客户投资组合中常见的一部分。因此，信托和财产规划律师必须至少大致熟悉这些类型的数字资产，才能胜任地为其客户提供建议。

了解数字资产的转移

密□的主要功能是安全性，是区□□的主干。未□所有者同意，加密□□（如加密□□）的□□受到很大阻碍。区□□安全的□健性在可以以“不是你的□匙，不是你的硬□”一句□来表征。事□上，区□□被□□是一种非常□健的安全技□，它开始在金融以外的□多行□中使用。

由于数字□□的高度安全性，如果没有事先做好□划，那么在所有者□世后将数字□□□移□□承人可能会极其复□。例如，如果没有更多信息，那么在附加到□□□划□划的□□明□表上□别数字□□可能是不够的。虽然□别是一个开始，但数字□□在□世□的□□□移需要考□密□和所有者的特定持有解决方案。

不同的数字□□有不同的□包解决方案。如果您持有数字□□，而您的□□□划□不知道冷□包、暖□包和□□包之□的区别，那么将□些类型的□□成功□□□您的□承人的可能性就不是很高。关于数百万美元的加密□□□失或无法□□的故事□在已□司空□□，通常涉及在所有者□世□存放在冷□包中的私□，而没有□份□划或知□的□□。虽然冷□包于在世□代表着极好的安全性，但它□也代表着□世□可造成的困□，需要具体的□划。

数字资产的财产规划

存在创造性转移解决方案，且在某些情况下可能需要该等方案。如果数字资产的管理方式能够确保私钥能够在适当的时间由适当的人安全地访问，则可以通过信托或遗产管理数字资产。与传统银行账户的转账不同，在传统银行账户中，金融机构有保险并提供额外监督，但错误或未经授权的数字资产转账几乎不可能收回。

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一位经验丰富的财产规划师可以确保信托明确授权您的受托人访问、保留和管理数字资产，无论这些资产是以何种方式持有的。每一项都是需要明确授予受托人的独立权力，有些管辖区比其他管辖区更适合加密。精明的房地产规划师可以就冷藏库、钥匙保管人、特殊受托人和适当的地点等选项提供建议。

此外，值得考虑的是，并非所有“传统”受托人，如信托公司和私人专业受托人，都愿意担任数字资产的受托人，无论是因为对技术的不熟悉，还是因为资产类别的波动性。因此，需要特别考虑受托人的选择，包括确认所选机构具有管理数字资产的专业知识和意愿。

热钱包（也称为加密交换）有不同的规则和规定，目前处于起步阶段。一些交易所允许信托拥有资产，而一些交易所则不允许。根据涉及的特定数字资产的不同，所有人可能无法通过传统方式将其资助到信托中。此外，对于其中一些数字资产，资产类别非常新，因此没有考虑死后转移。因此，确定特定的资产转移过程可能很麻烦。但是，如果不做好将财产转移给继承人的计划，很容易导致原本会转移给受益人的财富损失。

虽然加密团体为金融带来了一些才华，但其努力是为建立真正、可靠和安全的金融工具。复杂资产的所有权需要复杂而知识丰富的规划。

有关在信托、财产和投资组合中处理数字协助的更多信息，请联系作者或 Holland & Knight 私人财富服务数字资产团队的其他成员。

附注

[1] 行政命令，第 9（d）节

[2] 行政命令，第 9（c）节

[3] 行政命令，第 9（e）节

[4] 行政命令，第 9（b）节

[5] 行政命令，第 4（a）（i）节

[6] 行政命令，第 4（b）和（d）节，第 5（b）节，6-7 节

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FTC Set to Update Endorsement Guides on Social Media Advertising

A CLOSER LOOK AT THE PROPOSED CHANGES AND THEIR IMPACT ON YOUR BUSINESS

By Anthony E. DiResta, Da'Morus A. Cohen and Benjamin A. Genn

HIGHLIGHTS

- The Federal Trade Commission (FTC) is poised to issue updated Endorsement Guides after a comment period on the proposed changes. The Guides still require advertisers to clearly and conspicuously disclose material connections between a brand and its endorsers, but the updates reflect societal and technological changes to advertising, including tightening of guidelines relating to posting fake positive reviews or suppressing negative reviews.
- The updates reveal the FTC's deepening enforcement priority in regulating social media.
- The proposed revisions add a new section highlighting advertising directed at children and discussing the capacity of children to differentiate advertising content, including through disclosures recognizable and understandable to them.

The Federal Trade Commission (FTC) is poised to issue updated Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Guides) following a comment period on the proposed changes. This Holland & Knight alert provides an overview of the FTC's proposed updates and the potential impact on companies advertising through social media and similar channels.

INTRODUCTION: SOCIAL MEDIA ADVERTISING IS REGULATED

THROUGH THE FTC GUIDES

Through publication of the Guides, the FTC seeks to advise businesses on the proper disclosures and methodology of endorsement and testimonial advertising, as enforced through Section 5 of the FTC Act. The Guides are advisory only – they are guidelines – but the FTC publishes them to put those in the marketplace on notice of what is expected to avoid an enforcement action under the FTC Act's deception sections.

Generally, the Guides define endorsements and testimonials as an advertising message that leads consumers to believe it depicts the opinions, beliefs or experience of someone other than the advertising business. These types of advertisements, as other advertisements, must be honest, truthful and non-misleading, and must reflect the actual opinions or experience of the endorser. This is especially true because the advertiser must be able to substantiate any claims of its endorsers, and endorser claims will be interpreted as representing a typical experience that consumers can also expect to have. (If this is not the case, a brand must clearly and conspicuously disclose what a typical experience would be.)

Moreover, the Guides require an "expert endorser" – one with the experience, training or knowledge superior to regular consumers – to have the qualifications so represented and that would give the expert endorser expertise in the area of endorsement.

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Importantly, the Guides require an endorser to fully disclose any material connection between themselves and the brand, if that connection might materially affect the weight or the credibility of the endorsement. The endorser must actually use the product when giving the endorsement (and "actual consumers" must be actual consumers, or otherwise clearly and conspicuously disclosed as not actual consumers), and brands may be liable for false or unsubstantiated endorser statements or for failing to disclose any material connection. Unsurprisingly, the endorser may also be liable for statements that he or she makes.

Brands should be aware that the FTC expects its decision-making process on endorsements to be formed by the collective judgment of the business, not by a siloed department or personnel.

THROUGH FTC ENFORCEMENT ACTIONS

The FTC has engaged in a number of enforcement actions involving social media, including a recent settlement against Fashion Nova. There, the FTC alleged that the fashion retailer misrepresented product reviews on its website – specifically, that the posted reviews represented the ratings of all customers who submitted a review, when the posted reviews really only represented the portion of reviews submitted with 4 stars or higher out of 5 stars. All other reviews posted to the website were suppressed. Through the settlement, the retailer is prohibited from suppressing customer reviews and agreed to pay the FTC $4.2 million.

Social media is also subject to review by state attorneys general through their "deception" jurisdiction.

IMPACT OF UPDATED AND REVISED GUIDES

The FTC seeks comments on the revisions to the Guides online or in paper form and will publish the comments on Regulations.gov.

The proposed revisions to the Guides impact all businesses who engage in any form of social media advertising. The FTC continues to catch up to technological and societal advancements, especially in the advertising realm, and is not shy in bringing enforcement actions against bad actors in this space. In these actions, the FTC uses the same rules and regulations it has used for decades to enforce unfair and deceptive practices, this time expanding the scope to social media endorsers and the brands they advertise for.

As Commissioner Rebecca Kelly Slaughter stated last month, the FTC is attempting to bring more clarity, guidance and deterrence to this space. The goal of the Guides is to provide honest businesses with clear guardrails and not ambiguous hypotheticals.

The burden falls on all businesses to be aware of these developments and to comply with the rules and regulations enforced by the FTC. Thus, it is critical that all companies engaging in any form of social media advertising comply with the guardrails set forth in the Guides.

Businesses should especially be aware that:

- The proposed revisions represent the FTC's focus and interest on the deceptive practices of endorsers and their brands.
- Targeting specific audiences, including the elderly and children, requires audience-specific disclosures.

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- Material connections must be clearly and conspicuously disclosed. Brands should determine whether they have "material" connections, then disclose them.

- Online reviews must be honest, real and not gated (i.e., a brand must not suppress negative reviews).

PROPOSED REVISIONS, EXPLAINED

Among the various proposed revisions to the Guides, there are many that brands should be aware of and comply with, as stated in the FTC's notice of proposed changes.

a. **Definition of "endorsement":** The proposed revisions would clarify the definition of "endorsement" to clarify that "marketing" and "promotional" messages may be endorsements. The revised definition would also indicate that tags in social media posts can be endorsements.

b. **Fabricated endorsers:** Because an endorser could be an individual, group or institution, the revised Guides would apply to endorsements by fabricated endorsers.

c. **Bots, fake accounts:** It remains illegal to sell, purchase or use bots or other fake social media accounts to market goods and services.

d. **Purchasing or creating indicators:** It is a deceptive practice for users of social media to purchase or create indicators of social media influence.

e. **Definition of "product":** The Commission proposes modifying the definition to clarify that a "product" includes a "brand."

f. **Definition of "clear and conspicuous":** The proposed revisions add a new definition of "clear and conspicuous," meaning a disclosure that "is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers." The definition:

   – gives specific guidance to visual and audible disclosures

   – stresses the importance of "unavoidability" when the communication involves social media or the internet

   – states that the disclosure should not be contradicted or mitigated by, or inconsistent with, anything in the communication

   Generally, the format of the disclosure should be consistent with the format of the representation (i.e., when the triggering claim is visual, the disclosure should be at least visual).

g. **Targeting of an audience:** The definition of "clear and conspicuous" notes that when an endorsement targets a specific audience, such as older adults, its effectiveness will be evaluated from the perspective of members of that group.

   –**New Section 255.6:** The Commission proposes adding a section stating: "Endorsements in advertisements addressed to children may be of special concern because of the character of the audience. Practices which would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases."

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h. **Endorser liability:** Endorsers themselves may be subject to liability for their statements, including when they make representations that they know or should know to be deceptive. The level of due diligence required by the endorsers will depend on their level of expertise and knowledge, among other factors.

i. **Liability for intermediaries:** Intermediaries, such as advertising agencies and public relations firms, may be liable for their roles in disseminating what they knew or should have known were deceptive endorsements. In an example from the proposed revisions, advertising agencies may be liable when they intentionally engage in deception or that ignore obvious shortcomings of claims; they may also be liable if they fail to disclose unexpected material connections (by disseminating advertisements without necessary disclosures of material connection or by hiring and directing the endorsers who fail to make necessary disclosures).

j. **Images and likeness of people:** The use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.

k. **Modification of past posts:** An endorser does not need to go back and modify or delete past social media posts as long as the posts were not misleading when they were made and the dates of the posts are clear and conspicuous to viewers. However, if the endorser or publisher reposts the post, it would suggest to reasonable consumers that the endorser continued to hold the views expressed in the prior post.

l. **Liability for paid endorser:** A paid endorser and the company paying the endorser are both potentially liable for the endorser's social media post that fails to disclose the endorser's relationship to the company.

m. **Seller agreements to display reviews:** In procuring, suppressing, boosting, organizing or editing consumer reviews of their products, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products. This is true regardless of whether the reviews are considered "endorsements" under the Guides.

n. **When sellers are not required to display reviews:** Sellers are not required to display customer reviews that contain unlawful, harassing, abusive, obscene, vulgar or sexually explicit content, or content that is inappropriate with respect to race, gender, sexuality or ethnicity, or reviews that the seller reasonably believes are fake, so long as the criteria for withholding reviews are applied uniformly to all reviews submitted. Sellers are not required to display reviews that are unrelated to their products or services (such "services" include customer service, delivery, returns and exchanges).

o. **Paying for positive reviews:** Such reviews are deceptive, regardless of any disclosure of the payment, because the manufacturer has required that the reviews be positive.

p. **Solicitation of feedback from customers:** "Review gating" means practices that involve obtaining customer feedback and then sending satisfied and dissatisfied customers down different paths in order to encourage positive reviews and avoid negative reviews. Such disparate treatment may be an unfair or deceptive practice if it results in the posted reviews being substantially more positive than if the marketer had not engaged in the practice.

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q. **Ranking by third-party review site and paid ranking boosts:** A site that provides rankings of various manufacturers' products and accepts payments in exchange for higher rankings is deceptive regardless of whether the website makes an express claim of independence or objectivity. There is also potential liability of a manufacturer that pays for a higher ranking. If a manufacturer makes payments to the review site but not for higher rankings, there should be a clear and conspicuous disclosure regarding the payments, with a cross-reference to an example involving payments for affiliate links.

r. **Requirement of disclosure of material connections:** Advertisers must disclose connections between themselves and their endorsers that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience). The disclosures must:

– Be clear and conspicuous. The proposed revisions add a definition of that phrase (as discussed above), and delete the more ambiguous statement that such disclosures must be "fully" disclosed.

– Disclose any "material connection." Material connections can include a business, family or personal relationship; monetary payment; the provision of free or discounted products or services to the endorser, including products or services unrelated to the endorsed product; early access to a product; or the possibility of winning a prize, of being paid, or of appearing on television or in other media promotions. A material connection can exist regardless of whether the advertiser requires an endorsement for the payment or free or discounted products.

– Although the nature of disclosure does not require the complete details of the connection, it must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance.

s. **Celebrity endorsement interviews and disclosures during interviews:** A disclosure should be made during a celebrity interview because a disclosure during the show's closing credits is not clear and conspicuous. If the celebrity makes the endorsement in one of her social media posts, her connection to the advertiser should be disclosed regardless of whether she was paid for the particular post. Receipt of free or discounted services can constitute a material connection.

t. **Reuse of a celebrity's social media post:** When reusing a celebrity's social media posts in its own social media, an advertiser should clearly and conspicuously disclose its relationship to the celebrity (assuming the initial post necessitated a disclosure).

u. **Blogger who monetizes content:** A blogger who writes independent content reviewing products and who monetizes that content with affiliate links should clearly and conspicuously disclose the compensation.

SOCIAL MEDIA POLICIES ARE REQUIRED, AND COMPLIANCE IS MANDATORY

The FTC has made it clear: Social media policies are a must. As the authors have found out in defending several companies in FTC investigations, there are no exceptions for the size of the business, the product or service being sold, or the industry. Every business that engages in social media advertising must have a formal social media policy. Those policies should be implemented with management oversight and must be effective. The policies should be communicated to third-party vendors as well as employees.

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The FTC expects marketers to train employees on proper social media use. This obligation may extend beyond employees to third-party agents depending on the underlying relationship between a third-party agent and the marketer. Finally, some form of monitoring is expected to ensure compliance with the marketer's social media policy and the FTC's regulations and guidance.

HOW WE CAN HELP

Holland & Knight's Consumer Protection Defense and Compliance Team includes a robust social media practice, with experienced attorneys that are recognized thought leaders in the field. From representing dozens of companies and individuals in federal and state investigations concerning advertising and marketing to compliance counseling and transactional contract matters involving celebrities, the firm's practice includes regulatory, compliance, litigation, investigation and transactional work in the social media space.

For more information or questions about the specific impact that social media advertising and marketing regulations can have on you or your company, contact the authors.

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FTC 将更新社交媒体广告代言指南

更深入地了解拟议的变更及它们对您的业务的影响

原文作者：**Anthony E. DiResta** 、**Da'Morus A. Cohen** 和 **Benjamin A. Genn**

重點摘要

- 联邦贸易委员会（FTC）准备在对拟议变更进行评论后发布最新的广告代言指南。该指南仍然要求广告商清楚及显著地披露品牌与其代言人之间的重要联系，但更新反映了广告的社会和技术变化，包括收紧与发布虚假正面评论或压制负面评论有关的指南。
- 更新的指南揭示了联邦贸易委员会在监管社交媒体方面越来越高的优先执法顺序。
- 拟议修订增加了一节，重点介绍针对儿童的广告，并讨论儿童区分广告内容的能力，包括使他们能够识别和理解的披露信息。

联邦贸易委员会（FTC）准备在对拟议变更进行评论后，发布关于在广告中使用代言和推荐的最新指南（指南）。本 Holland & Knight 提示文章概述了 FTC 的拟议更新，以及其对通过社交媒体和类似渠道进行广告的公司的潜在影响。

引言：社交媒体广告受到监管

通过 FTC 指南

通过发布指南，联邦贸易委员会寻求就通过《联邦贸易委员会法案》第 5 节执行的代言和推荐广告的适当披露和方法向企业提供建议。这些指南只是建议性的——它们是指导原则——但联邦贸易委员会发布这些指南是为了让市场注意到它们应该作什么，以避免根据联邦贸易委员会法案的欺骗条款对它们提起的执法行动。

一般来说，指南将代言和推荐定义为一种广告信息，使消费者相信它描述了广告商以外的其他人的意见、信念或经验。这些类型的广告与其他广告一样，必须是诚实、真实和不误导的，并且必须反映代言人的实际意见或经验。这一点尤其正确，因为进行广告的人必须能够证实其代言人的任何主张，而代言人的主张将被解释为代表了消费者也可以期望的典型体验。（如果不是这样，一个品牌必须清楚及显著地披露典型体验。）

此外，指南要求“专家代言人”—是一具有优于普通消费者的经验、培训或知识的人——具备所代表的资格，且该资格这将赋予专家代言人代言领域的专业知识。

重要的是，指南要求代言人充分披露自己与品牌之间的任何重要联系，如果这种联系可能对代言的分量或可信度产生重大影响。代言人在提供代言时必须实际使用产品（并且“实际消费者”必须是真实的消费者，或者以其他方式明确及显著地披露其非实际消费者），品牌可能对虚假或未经证实的代言人的陈述或未能披露任何重要联系负责。不意外地，代言人也可能对其所作的陈述负责。

品牌应意识到，联邦贸易委员会希望其代言决策过程由企业的集体判断所形成，而不是由各自为政的部门或人员形成。

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通过 FTC 执法行动

FTC 已经进行了一系列涉及社交媒体的执法行动，包括最近针对 Fashion Nova 的和解。在该案，FTC 指控这家时尚零售商在其网站上虚假陈述了产品评论——具体来说，发布的评论说其包括了所有提交评论的客户的评论，而发布的评论实际上只包括了提交的评论中属 5 颗星中 4 颗星或更高的那部分评论。发布到该网站的所有其他评论均被禁止。通过和解，该零售商被禁止压制客户评论，并同意向联邦贸易委员会支付 420 万美元。

社交媒体也受到州总检察长通过其“欺诈”管辖权的审查。

更新和修订指南的影响

FTC 在线或以纸质形式征求对指南修订的意见，并将在 Regulations.gov 上发布意见。

对指南的拟议修订影响到所有从事任何形式社交媒体广告的企业。联邦贸易委员会继续追赶技术和社会进步，特别是在广告领域，并毫不犹豫地对这一领域的不良行为者采取执法行动。在这些行动中，联邦贸易委员会使用了几十年来一直用于实施不公平和欺骗性做法的规则和条例，这一次将范围扩大到社交媒体代言人和他们所宣传的品牌。

正如委员丽贝卡•凯利•斯劳特（Rebecca Kelly Slaughter）上个月所说，联邦贸易委员会（FTC）正试图为这一领域带来更多的清晰、指导和威慑。指南的目标是为诚实的企业提供清晰的防护规定和不含糊的示例。

所有企业都要意识到这些发展，并遵守 FTC 执行的规则和条例。因此，所有从事任何形式社交媒体广告的公司都必须遵守指南中防护规定，这一点至关重要。

企业应特别注意：

- 拟议修订显示了 FTC 对代言人及其品牌欺骗行为的关注和兴趣。
- 对特定受众，包括老人和儿童，要求提供针对该特定受众的披露信息。
- 必须清楚、显著地披露重要连系。品牌应该确定他们是否有“重要”联系，然后披露它们。
- 在线评论必须诚实、真实且不受限制（即，品牌不得压制负面评论）。

拟议修订、解释

对指南的各种拟议修订中，包括有许多品牌应了解并遵守的如在 FTC 的拟议变更的通知中所述的规定。

a. **“代言”的定义：**拟议修订将澄清“代言”的含义，以澄清“营销”和“促销”信息可能是代言。修改后的定义还表明，社交媒体帖子中的标签可能是代言。

b. **虚假代言人：**由于代言人可以是个人、团体或机构，修订后的指南将适用于虚假代言人的代言。

c. **机器人、虚假账户：**销售、购买或使用机器人或其他虚假社交媒体账户营销商品和服务仍然是违法的。

d. **购买或创建指标：**社交媒体用户购买或创建社交媒体影响力指标是一种欺骗行为。

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e. **“产品”的定义：**委员会建议修改定义，以澄清“产品”包括“品牌”

f. **“清晰明显”的定义：**拟议修订增加了“清晰明显”新定义，即“普通消费者难以错过（即容易注意到）且易于理解的披露”。该定义：

- 为视觉和听觉披露提供具体指导
- 强调当通信涉及社交媒体或互联网时，“不可避免”的重要性
- 声明披露不应与通信中的任何内容相矛盾或矛盾

通常，披露的格式应与陈述的格式一致（即，当触发声明是视觉的时，披露至少应是视觉的）。

g. **针对受众：**“清晰和显眼”的定义指出，当代言针对特定受众（如老年人）时，其有效性将从该群体成员的角度进行评估。

- **新的第 255.6 节：**委员会建议增加一节：“由于受众的特点，针对儿童的广告中的代言可能会受到特别关注。在这种情况下，针对成年人的广告中通常不会受到质疑的做法可能会受到质疑。”

h. **代言人责任：**代言人本身可能对其陈述承担责任，包括当他们作出他们知道或应该知道具有欺骗性的陈述时。代言人所需的尽职调查水平将取决于其专业知识水平以及其他因素。

i. **中介机构的责任：**广告公司和公共关系公司等中介机构可能对其传播其知道或应该知道的虚假代言的作用负责。在拟议修订中的一个例子中，如果广告公司故意进行欺骗或忽视索赔的明显缺陷，则可能需要承担责任；如果他们没有披露没有预期的重要联系（通过在没有必要披露重要联系的情况下传播广告，或者通过雇用和指导没有进行必要披露的代言人），他们也可能要承担责任。

j. **人的形象和肖像：**如果使用代言与实际代言人以外的人的形象或肖像一起使用，如果它歪曲了代言人的重要特征，则是具有欺骗性的。

k. **修改过去的帖子：**只要帖子在发布时没有误导性，并且帖子的日期对观众来说清晰可见，代言人就不需要回去修改或删除过去的社交媒体帖子。然而，如果代言人或出版商转载了该帖子，则会向理性的消费者建议，代言人继续保持之前帖子中表达的观点。

l. **付费代言人的责任：**付费代言人和支付代言人的公司都可能对没有披露代言人与公司的关系的代言人的社交媒体帖子承担责任，。

m. **卖家同意展示评论：**在获取、压制、宣传、组织或编辑消费者对其产品的评论时，广告商不应采取扭曲或以其他方式歪曲消费者对其商品的看法的行为。无论评论是否被视为指南下的“代言”这应如此。

n. **当卖家不需要展示评论时：**卖家不需要显示包含非法、骚扰、虐待、淫秽、低俗或色情内容的客户评论，或不适合种族、性别、性取向或种族的内容，或卖家合理认为虚假的评论，只要拒绝评论的标准统一适用于提交的所有评论。卖家无需展示与其产品或服务无关的评论（此类“服务”包括客户服务、交付、退货和交换）。

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o. **为正面评论付费：**无论是否披露付款，此类评论都是欺骗性的，因为制造商要求评论是正面的。

p. **征求客户反馈：**“评论分门”指的是获取客户反馈，然后将满意和不满意的客户发送到不同的路径，以鼓励正面评论，避免负面评论。如果这种不同的待遇导致发布的评论比营销人员没有采取此做法的情况下更为正面的话，则可能是不公平或欺骗性的做法。

q. **通过第三方审查网站排名和付费排名提升：**提供各种制造商产品排名并接受付款以换取更高排名的网站是欺骗性的，无论该网站是否明确声称其独立性或客观性。为更高排名付费的制造商也有潜在的责任。如果制造商向评论网站付款，但不是为了获得更高的排名，则应明确和明显地披露有关付款的信息，并交叉引用涉及附属链接付款的示例。

r. **披露实质性联系的要求：**广告商必须披露自己与其代言人之间的联系，这些联系可能会对代言的权重或可信度产生重大影响（即，观众无法合理预期这种联系）。披露必须：

 – 清晰、显著。拟议修订增加了该短语的定义（如上所述），并删除了更模糊的声明，即此类披露必须“完全”披露。

 – 披露任何“重要联系”。重要联系可以包括商业、家庭或个人关系；金钱支付；向代言人提供免费或折扣产品或服务，包括与代言产品无关的产品或服务；尽早获得产品；或者赢得奖金、获得报酬、出现在电视上或其他媒体宣传中的可能性。无论广告客户是否需要付款或免费或折扣产品的代言，都可能存在重要联系。

 – 尽管披露的性质不需要完整的联系细节，但必须充分明确地传达联系的性质，以便消费者评估其重要性。

s. **名人代言采访和采访期间的披露：**应在名人采访期间进行披露，因为在节目结束时披露的信息并不清楚和明显。如果名人在她的社交媒体帖子中做了代言，那么不管她是否为某个帖子付费，她与广告客户的关系都应该被披露。收到免费或折扣服务可能构成重要联系。

t. **重用名人的社交媒体帖子：**当在自己的社交媒体中重用名人的社会媒体帖子时，广告客户应清楚、显著地披露其与名人的关系（假设最初的帖子需要披露）。

u. **将内容盈利的博主：**撰写独立内容审查产品的博主，以及通过附属链接将该内容盈利的博客主，应清楚、显著地披露薪酬。

社交媒体政策是必需的、且合规是强制性的

FTC 明确表示：建立社交媒体政策是必须的。正如作者在 FTC 调查中为几家公司辩护时所发现的那样，业务规模、销售的产品或服务或行业都不例外。每个从事社交媒体广告的企业都必须有正式的社交媒体政策。这些政策应在管理层监督下执行，并且必须有效。政策应传达给第三方供应商和员工。

FTC 希望营销人员培训员工如何正确使用社交媒体。根据第三方代理与营销者之间的潜在关系，该义务可能会超出员工范围，延伸至第三方代理人。最后，某种形式的监控有望确保遵守营销者的社交媒体政策和 FTC 的法规和指导。

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我们能如何提供协助

Holland & Knight 的消费者保护辩护和合规团队拥有强大的社交媒体业务，拥有经验丰富的律师，他们是该领域公认的思想领袖。从代表数十家公司和个人参与有关广告和营销的联邦和州调查，到合规咨询和涉及名人的交易合同事宜，该公司的业务包括社交媒体领域的监管、合规、诉讼、调查和交易工作。

有关社交媒体广告和营销法规可能对您或您的公司产生的具体影响的更多信息或问题，请联系作者。

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Working with Forensic Accountants in Internal Investigations

By Elissa McClure and Sydne Collier

This article addresses identifying the need for forensic accountants and best practices for working with them throughout an internal investigation.

Forensic accountants are accounting specialists who analyze data to detect anomalies, questionable activity and fraud. After retaining the accountants, you should work closely with the forensic accounting team, including communicating frequently to effectively direct their work, meet deadlines, glean any strategy insights and identify as early as possible any issues uncovered through the accountants' work.

Timing, expectations and overall strategy should be communicated clearly and regularly. The interview process should have confirmed that the retained accounting firm is well-equipped from an expertise, staffing and technology perspective to meet expected deadlines with high-quality work product, even in time-sensitive and complex investigations.

COLLABORATE WITH AND DIRECT FORENSIC ACCOUNTANTS EFFECTIVELY

With respect to the data, you must work with the accountants to ensure that they have access to all documents and information relevant to their analyses.

For instance, a Foreign Corrupt Practices Act investigation may involve documents relating to success fees and third-party intermediary invoices. Access to all such documents should be provided to the accountants.

Information relevant to the accountants' analysis will often be located in enterprise resource planning, or ERP, systems. Forensic accountants can also harmonize data outside ERP systems, such as due diligence information, with ERP system data to create a more comprehensive overview of a situation or potential compliance issues.

Prior to the outset of the investigation, you should ensure a comprehensive document retention program is in place and issue appropriate hold notices. In situations where the relevant information is located in a foreign jurisdiction, it may be appropriate for the accountants to review such data in the jurisdiction where it is located to ensure compliance with applicable laws and potentially avoid the reach of the U.S. government's subpoena power.

You should integrate the forensic accountants into the witness interview process where appropriate to gain additional insight from the testimony.

For example, accountants may suggest accounting-focused questions for a chief financial officer or other employees regarding financial occurrences or potential conflicts of interest. Thus, you should keep accountants abreast on timing and substance concerning witnesses who may have information relevant to the accountants' analyses.

Forensic accountants should work closely with counsel throughout the investigation to sync up financial or accounting data points with evidence by the legal team from other sources including document reviews, email traffic and evidence gathered through interviews. Working closely with counsel will help ensure that key facts and issues considered by the accountants can be comprehensively validated or refuted with other contemporaneous evidence.

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At all times during the investigation, forensic accountants retained to act in an expert witness capacity must remain independent and objective. Their work cannot and should not be influenced by the client, counsel or other outside factors.

You should be mindful when working with the retained professionals and refrain from suggesting a certain view of materials or otherwise influencing the forensic accountants to reach a certain conclusion.

MODIFICATIONS TO — OR EXPANSIONS OF — SCOPE

During the investigation, accountants may identify additional issues or red flags that warrant exploration; information to obtain from the client and potentially other sources, or witnesses to consider interviewing; and possible financial analyses and theories to incorporate into the ongoing investigation strategy, determinations or conclusions that may warrant additional or different investigation strategy or scope.

Any one or more of these may cause you, the accountants or the client to suggest a change in the scope of the investigation. Generally, such investigation scope changes do not affect the accountants' scope of work as set forth in their engagement agreement.

CULMINATING THE FORENSIC ACCOUNTANTS' WORK: WORK PRODUCT, RECOMMENDATIONS AND PRESENTATION CONSIDERATIONS

At the conclusion of the accountants' work or of the investigation, the forensic accountants will typically present their findings to you. The findings can be presented orally or in writing — or a combination of the two — while being mindful of attorney-client privilege and the possibility of creating discoverable materials.

When reporting their findings, forensic accountants should describe all the following: (1) the initiating event or scope of work; (2) the process and procedures followed or undertaken; (3) the documents and data reviewed; (4) their findings relating to any financial or accounting issues; and (5) any recommendations or next steps the client should consider based upon their findings.

Although sophisticated forensic accountants are generally well-versed in privilege issues, counsel should nonetheless remind them of privilege and work product protections. Forensic accountants should mark work product as confidential and attorney-client privileged as appropriate.

With respect to accountants' recommendations, typically fraud or corruption occurs when either corporate controls are missing or established controls are circumvented. Forensic accountants can typically make recommendations covering a broad range of topics depending on the nature of the investigation at hand and the fraud schemes identified.

The types of possible recommendations are too numerous to list but could include things like:

- Establishing or strengthening controls around onboarding and monitoring of third parties;
- Establishing or strengthening controls around cash disbursements including the detection of manual payment, duplicate payments, offshore payments or round dollar payments, etc.;
- Establishing or strengthening controls around the preparation and review of manual journal entries;

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- Ensuring or strengthening adequate controls over pricing, rebates and discounts;
- Ensuring adequate segregation of duties across key functions;
- Establishing or strengthening controls and monitoring around disclosures of conflicts of interest; and
- Putting in place mechanisms to monitor corporate transactions for the identification of red flags and suspicious transactions.

You can incorporate the accountants' findings into reports to the client and, if the investigation remains ongoing, into the investigation inquiries. It is generally best to provide interim reports orally.

As for whether there should be a written report at the conclusion of the investigation, counsel and the client should thoroughly assess the purpose, findings, recommendations and necessity of a written report prior to its preparation. When preparing the final report, you should be mindful that different U.S. jurisdictions may take a different approach to its discoverability.

If the forensic accountants conclude their work prior to the investigation's conclusion, it may be advantageous to keep them retained for any potential new accounting issues that may arise.

After the investigation has concluded and all reports are finalized, the forensic accountants' engagement can be terminated. Their work product created throughout the course of the investigation should be sent to counsel to be handled with other work product in connection with the investigation.

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与司法鑒定会计师在内部调查中合作

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本文旨在确定司法鉴定会计师的需求以及在整个内部调查过程中与他们合作的最佳实践。

司法鉴定会计师是会计专家，他们分析数据以侦测异常情况、可疑活动和欺诈行为。聘请会计师后，您应该与司法鉴定会计团队密切合作，包括经常沟通以有效指导他们的工作、确保按时完成工作、收集任何战略见解并尽早发现通过会计师工作找到的任何问题。

应明确及定期地对时间安排、期望和总体战略进行沟通。面试过程时应该已经确认聘请的会计师事务所很具备使他们能够在预期的期限内提出高质量的工作产品所需的专业知识、人员配置和技术，即使是在时间敏感和复杂的调查中亦然。

有效地与司法鉴定会计师合作并指导他们

关于数据，您必须与会计师合作以确保他们能够访问与其分析相关的所有文件和信息。

例如，《反海外腐败法》调查可能涉及与成功费用和第三方中介发票有关的文件。应向会计师提供所有此类文件的访问权限。

与会计师分析相关的信息通常位于企业资源规划或 ERP 系统中。司法鉴定会计师还可以将
ERP 系统之外的数据（例如尽职调查信息）与 ERP 系统数据进行协调，以更全面地了解情况或潜在的合规问题。

在调查开始之前，您应确保制定了全面的文件保留计划并发出适当的保留通知。在相关信息位于外国司法管辖区的情况时，会计师可能适合在其所在司法管辖区审查此类数据，以确保符合适用法律并可能避免美国政府的传唤权。

您应该在适当的情况下将司法鉴定会计师纳入证人面谈过程，以便从证词中获得更多见解。

例如，会计师可能会就财务事件或潜在利益冲突向首席财务官或其他员工提出专注于会计的问题。因此，您应该让会计师及时了解证人的时间和内容，这些证人可能拥有与会计师分析相关的信息。

司法鉴定会计师应在整个调查过程中与律师密切合作，将财务或会计数据点与法律团队从其他来源（包括文件审查、电子邮件流量和通过访谈收集的证据）取得的证据同步连结起来。与律师密切合作将有助于确保会计师考虑的关键事实和问题能够得到全面验证或能够反驳其他当时的证据。

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在调查期间，以专家证人身份行事的司法鉴定会计师必须始终保持独立和客观。他们的工作不能也不应该受到客户、律师或其他外部因素的影响。

在与聘请的专业人士合作时，您应该注意克制不要对资料提出某种看法或以其他方式影响司法鉴定会计师得出某种结论。

范围的修改或扩展

在调查期间，会计师可能会发现需要探索的其他问题或警示信号、需从客户和可能的其他来源或证人那里获得的信息、需考虑进行面谈的证人、需纳入正在进行的调查策略的可能的财务分析和理论、以及证明可能需要额外或不同的调查策略或范围的决定或结论。

其中任何一项或多项都可能导致您、会计师或客户建议更改调查范围。一般而言，此类调查范围变更不会影响会计师在其聘用协议中规定的工作范围。

司法鉴定会计师的工作：工作成果、建议和陈述考虑事项

在会计师的工作或调查结束时，司法鉴定会计师通常会向您呈现他们的调查结果。调查结果可以口头或书面形式（或两者结合）呈现。与此同时应注意律师-客户特权及可能创造可被要求揭露的材料的问题。

在报告调查结果时，司法鉴定会计师应描述以下所有内容：(1) 初始事件或工作范围；(2) 遵循或采取的过程和程序；（3）审查的文件和资料；(4) 他们对任何财务或会计问题的调查结果；及(5) 客户应根据其调查结果考虑的任何建议或后续步骤。

尽管经验丰富的司法鉴定会计师通常精通特权问题，但律师仍应提醒他们特权和工作产品保护问题。司法鉴定会计师适当时应在工作产品上标记机密和律师-客户特权字样。

关于会计师的建议，当公司控制缺失或既定控制被规避时，通常会发生欺诈或腐败。司法鉴定会计师通常可以根据手头调查的性质和确定的欺诈计划提出涵盖广泛议题的建议。

可能的建议类型太多而无法列出，但可能包括以下内容：

- 建立或加强对第三方入职和监测的控制；
- 建立或加强对现金支付的控制，包括检测人工支付、重复支付、离岸支付或整数金额支付等；
- 建立或加强对手工日记账分录的编制和审查的控制；
- 确保或加强对定价、回扣和折扣的足够控制；
- 确保关键职能之间的职责充分区隔；

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- 对利益冲突的披露建立或加强控制和监督；和
- 建立机制来监控公司交易，以发现危险信号和可疑交易。

您可以将会计师的调查结果纳入提交给客户的报告中，如果调查仍在进行，则可以纳入调查询问文件。通常最好口头提供中期报告。

至于在调查结束时是否应有书面报告，律师和客户应在准备书面报告之前彻底评估书面报告的目的、调查结果、建议和必要性。在准备最终报告时，您应该注意不同的美国司法管辖区可能对其是否可被要求揭露有着不同的做法。

如果司法鉴定会计师在调查结束之前就结束了他们的工作，那么留用他们以应对可能出现的任何潜在的新的会计问题可能是有利的做法。

在调查结束并完成所有报告后，可以终止司法鉴定会计师的聘用。他们在整个调查过程中创建的工作成果应发送给律师，以便与与调查有关的其他工作成果一起处理。

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About This Newsletter
有关本期刊

Information contained in this newsletter is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel. Holland & Knight lawyers are available to make presentations on a wide variety of China-related issues.

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Robert A. Friedman helps clients address a range of complex legal, regulatory and policy issues that involve international trade and investment, government regulation of cross-border transactions and compliance with U.S. laws based on foreign policy and national security. He advises businesses, entrepreneurs, investors and trade associations on matters related to economic sanctions, export controls, foreign direct investment, supply chain security, customs laws, data privacy and cybersecurity, market access, anti-corruption and national security regulations. He leverages his experience as a legal counselor and senior policy advisor to top executive branch officials to deliver practical and strategic results for clients facing a range of challenges that often entail domestic and international dimensions.

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