

# Trump Administration Issues Potentially Sweeping Guidance on Trade, Immigration Rulemakings

US – March 24, 2025

On March 14, 2025, Secretary of State Marco Rubio issued sweeping [new guidance](#) that purports to exempt immigration and cross-border commerce from certain procedural requirements under the Administrative Procedure Act (APA). The guidance could have an immediate impact on two key policy areas for the Trump administration, trade and immigration, and represents a further effort by the Trump administration to consolidate power, particularly over [foreign affairs](#), within the executive branch. However, as we have observed with other such efforts, the scope and enforceability of the latest guidance will ultimately be determined by the judicial branch – litigation challenging the legality of the guidance seems inevitable.

The guidance states that all US government efforts to control the border, including “the status, entry and exit of people,” as well as “the transfer of goods, services, data, technology and other items across the borders of the United States,” will be considered to constitute a “foreign affairs function” for the purposes of federal agency rulemaking and formal adjudications under the Administrative Procedure Act, 5 U.S.C. §§ 553, 554. Notably, each of these provisions states that it does not apply to “foreign affairs functions.” Section 553 is the APA provision that mandates notice and comment rulemaking, and section 554 governs the adjudication of certain kinds of cases in front of agencies. Each of them excludes certain categories of government decision, and particularly “foreign affairs functions.” The guidance states that the Department of State now interprets that phrase to cover a wide range of activities across the “Department of State, the Department of Defense, the Department of Homeland Security, the Department of Justice, and many other federal agencies.”

The guidance may affect revisions to, or new rules implementing, the Immigration and Nationality Act, as well as new customs or trade related regulatory efforts. The agencies making those rules may now seek to fast-track those efforts rather than proceeding under notice and comment rulemaking process established by section 553 of the APA, which otherwise requires agencies to give notice of proposed changes to regulations and provide an opportunity for proposed comment. This would add uncertainty to already [turbulent trade and immigration landscapes](#).

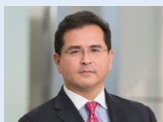
For example, the guidance would appear to offer the US Department of Commerce’s Bureau of Industry and Security (BIS) additional cover for its current practice of implementing changes without proposed rules. BIS tends to use an advance notice of proposed rulemaking (ANPRM), or proposed rule when BIS is seeking industry guidance. More often, when BIS considers that they need to implement a change, BIS will publish an interim final rule to have immediate effect and make corrections later, if needed. In fact, recently BIS issued a rule that allowed BIS to change the application of the rule by updating its website, without any further rulemaking process.

Despite its sweeping rhetoric, however, important restrictions on the foreign affairs function exception to the APA remain in place that will likely constrain the impact of this latest guidance. By its own terms, the guidance only applies to the APA’s rulemaking and particular adjudication requirements; it does not implicate courts’ ability to review agency action, which is also enshrined in the APA. Parties will therefore continue to challenge agency action implicating the border on the basis that it is insufficiently reasoned, without observance of procedures of law and in excess of the authority granted to an agency by Congress.

Moreover, courts have historically been reluctant to interpret the foreign affairs exception to the APA broadly. Courts in several jurisdictions, including in Washington, DC, where challenges to agency action are most often litigated, have repeatedly held that the foreign affairs function exception applies only if an agency action “clearly and directly” involves a “foreign affairs function of the United States.” *E.B. v. U.S. Dep’t of State*, 583 F. Supp. 3d 58, 63 (D.D.C. 2022). For example, in *E.B. v. U.S. Dep’t of State*, the U.S. District Court for the District of Columbia refused to apply the APA foreign affairs exemption to changes to immigration requirements in 2022, observing that the Washington, DC Circuit has “only” applied the exemption when a rule implements an international agreement between the United States and a foreign state. The Court of International Trade likewise declined to apply the APA foreign affairs exemption to efforts to impose tariffs on Chinese goods under Section 301 of the Trade Act. *In re Section 301 Cases*, 570 F. Supp. 3d 1306 (Ct. Int’l Trade 2022). Courts in these jurisdictions have also held that the interpretation of APA provisions, such as the “foreign affairs” exception, is the province of the judiciary, not of any particular agency. Nonetheless, there may be jurisdictions that choose to defer to the executive branch and adopt the position outlined in the guidance.

Ultimately, the true impact of the guidance will be appreciated only after there are specific attempts by the executive branch to implement it and circumvent the APA’s requirements regarding cross-border regulations. Our team of legal, regulatory and policy attorneys is standing by to advise companies seeking tailored advice concerning implications of the guidance’s application.

## Contacts



**Pablo E. Carrillo**

Of Counsel, Washington DC  
T +1 202 457 6415  
E [pablo.carrillo@squirepb.com](mailto:pablo.carrillo@squirepb.com)



**Keith Bradley**

Partner, Denver  
T +1 303 894 6156  
E [keith.bradley@squirepb.com](mailto:keith.bradley@squirepb.com)



**Morgan Miller**

Principal, Washington, DC  
T +1 202 457 6059  
E [morgan.miller@squirepb.com](mailto:morgan.miller@squirepb.com)



**Ludmilla L. Kasulke**

Partner, Washington, DC  
T +1 202 457 5125  
E [ludmilla.kasulke@squirepb.com](mailto:ludmilla.kasulke@squirepb.com)



**George N. Grammas**

Partner, Washington DC  
T +1 202 626 6234  
E [george.grammas@squirepb.com](mailto:george.grammas@squirepb.com)



**Samuel J. Mudrick**

Partner, Washington, DC  
T +1 202 457 5218  
E [samuel.mudrick@squirepb.com](mailto:samuel.mudrick@squirepb.com)



**Bridget McGovern**

Partner, Washington DC  
T +1 202 457 6104  
E [bridget.mcgovern@squirepb.com](mailto:bridget.mcgovern@squirepb.com)