GOVERNING FOR IMPACT

Final Agency Action

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Issue Brief

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I. INTRODUCTION

The Administrative Procedure Act provides for judicial review of "final agency action."[1] Final agency action is frequently misunderstood to refer only to full-dress legislative rules issued using notice-and-comment procedures. But administrations carry out large portions of their agendas through other categories of agency action, many of which also satisfy the finality requirement. For example, personnel decisions, grant rescissions, and information disclosures can all qualify as final agency action. Perhaps most importantly, many forms of agency guidance — such as legal opinions and determinations, statements of agency priorities and procedure, and letters to regulated entities and sectors — may be final as well. Moreover, unwritten policies and even a failure to act can count as final.

More generally, finality law is "flexible" and "hardly crisp" — because courts analyzing finality conduct a "pragmatic inquiry" into how agency action operates in the real world.[2] Litigants seeking to take on the Trump administration's agenda might therefore argue that a wide range of agency actions count as final. This Issue Brief outlines the law that might underlie such arguments. A broad view of finality is especially important now, as the Trump administration has made plain that it intends to unlawfully eschew notice-and-comment procedures in issuing substantive rules.[3]

II. THE MEANING OF "FINALITY"

5 U.S.C. § 704 extends the APA's cause of action to "[a]ctions made reviewable by statute and final agency action for which there is no other adequate remedy in a

[1] 5 U.S.C. § 704. Other statutes providing for judicial review of agency action have similar finality requirements. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (Clean Air Act); 21 U.S.C. § 877 (Comprehensive Drug Abuse Prevention and Control Act).

[2] *MediNatura, Inc. v. FDA*, 998 F.3d 931, 938 (D.C. Cir. 2021).

[3] *See, e.g.*, *Rapid Response: Presidential Memorandum on "Directing the Repeal of Unlawful Regulations,"* Governing for Impact (Apr. 2025), https://governingforimpact.org/wp-content/uploads/2025/04/Rapid-Response-re-Directing-the-Repeal-of-Unlawful-Regulations-final.pdf.

court."[4] According to the Supreme Court in *Bennett v. Spear*, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking process" and "second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[5]

A. "Consummation of the Agency's Decisionmaking Process"

An action represents the consummation of the agency's decisionmaking process when it is the "last word" on a particular subject, at least for the moment.[6] Agency action that is "informal," "only the ruling of a subordinate official," "tentative," or "interlocutory" is not final.[7] "The decisionmaking processes set out in an agency's governing statutes and regulations are key to determining whether an action is properly attributable to the agency itself and represents the culmination of that agency's consideration of an issue."[8]

In *U.S. Army Corps of Engineers v. Hawkes Co.*, for instance, the Supreme Court held that an approved jurisdictional determination issued by the Army Corps of Engineers stating that a parcel of land contains "waters of the United States" within the meaning of the Clean Water Act "satisfies the first *Bennett* condition."[9] Drawing on Corps rules and an internal manual, the Court observed that approved jurisdictional determinations are "issued after extensive factfinding by the Corps," "typically not

[4] The finality requirement reflects that "[j]udicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise" and prevents "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *FTC v. Standard Oil of Cal.*, 449 U.S. 232, 242 (1980).

[5] 520 U.S. 154, 177–78 (1997) (internal quotation marks omitted).

[6] *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 636 (D.C. Cir. 2019).

[7] *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (2018) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 151 (1967)); *Bennett*, 520 U.S. at 178.

[8] *Soundboard Ass'n*, 888 F.3d at 1267; *accord California Communities*, 934 F.3d at 631 ("[W]hen assessing the nature of an agency action (including whether it is final), courts should resist the temptation to define the action by comparing it to superficially similar actions in the caselaw. Rather, courts should take as their NorthStar the unique constellation of statutes and regulations that govern the action at issue.").

[9] 578 U.S. 590, 594–97 (2016).

revisited," and classified by regulation as "'final agency action.'"[10] By contrast, *preliminary* jurisdictional determinations do not consummate Corps decisionmaking — they are "'advisory in nature' and simply indicate that 'there *may* be waters of the United States' on a parcel of property."[11]

Another example of an administrative determination shown by applicable statutes and regulations not to be the agency's last word is a "complete response letter" issued by the Food and Drug Administration in response to a deficient drug application. In *Nostrum Pharmaceuticals, LLC v. FDA*, the D.C. Circuit found that such letters are "an interim step in the FDA's consideration of an application" because they "simply afford applicants the opportunity to provide additional information before the agency makes a final decision on the application."[12] Thus, "the recipient of a complete response letter 'still enjoys an opportunity to convince the agency to change its mind.'"[13]

However, an action can represent the consummation of an agency's decisionmaking process even where a party could still seek reconsideration or appeal at the agency level — so long as neither statute nor regulation requires such further steps. That is, there is generally no requirement to appeal an otherwise final decision. As the Supreme Court has put it, "an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review."[14] And while "an agency's decision to reopen a case may render a final agency action nonfinal," that principle does not apply "when there is evidence that the government has reopened the case not to reconsider new evidence but

[10] *Id.* at 597–98 (citing U.S. Army Corps of Eng'rs, Jurisdictional Determination Form Instructional Guidebook 47–60 (2007), then quoting 33 C.F.R. § 320.1(a)(6)).

[11] *Id.* at 597 (emphasis added) (quoting 33 C.F.R. § 331.2).

[12] 35 F.4th 820, 825 (D.C. Cir. 2022).

[13] *Id.* at 826 (quoting *MediNatura*, 998 F.3d at 939).

[14] *Darby v. Cisneros*, 509 U.S. 137, 154 (1993); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) ("*Darby* stands for the proposition that absent a statutory or regulatory requirement to the contrary, courts have no authority to require petitioners seeking judicial review of a final agency action to further exhaust administrative procedures. Here, although Board regulations do permit a petition for rehearing, neither the ICC Termination Act of 1995 nor the Board's regulations requires one. Under *Darby,* therefore, we had no authority to require Norfolk Southern to file a petition for rehearing once the agency issued its final rule." (citations omitted)).

rather to delay a decision," "or when there is no indication as to what new information the agency can review."[15]

Likewise, an agency cannot generally defeat finality by:

- Pointing to the possibility that it may change course in the future—"a common characteristic of agency action."[16] That "does not make an otherwise definitive decision nonfinal."[17]
- Temporarily pausing a regulation or program pending further review. As the D.C. Circuit explained in *Clean Air Council v. Pruitt*, an agency's decision to "grant[] an application for interim relief from a … standard while it reconsider[s] that standard … represents the final agency position on this issue, has the status of law, and has an immediate and direct effect on the parties."[18] In other words, such decisions are "final," even if they might be subject to revision at some future point.
- Staking out a position that can only be given effect through subsequent enforcement actions or implementing guidance. That generally bears on the second consideration in the finality analysis, whether agency action produces legal consequences, which is discussed next.

B. "Rights," "Obligations," or "Legal Consequences"

To be "final" within the meaning of the APA, an agency's action must also give "rise to direct and appreciable legal consequences."[19] It can do so by creating or

[15] *RELX, Inc. v. Baran*, 397 F. Supp. 3d 41, 50–51 (D.D.C. 2019); *see also Mantena v. Hazuda*, 2018 WL 3745668, at *6 (S.D.N.Y. Aug. 7, 2018).

[16] *Hawkes*, 578 U.S. at 598; *see also Sackett v. EPA*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider in light of informal discussion and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." (internal quotation marks omitted)).

[17] *Hawkes*, 578 U.S. at 598.

[18] 862 F.3d 1, 6 (D.C. Cir. 2017); *see also Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) (time-limited "suspension was not a moving target, but a final and binding determination" (internal quotation marks omitted)).

[19] *California Communities*, 934 F.3d at 635 (internal quotation marks omitted) (quoting *Hawkes*, 578 U.S. at 598).

suspending legal rights and obligations outright,[20] by providing or denying safe harbors from enforcement proceedings,[21] by setting an agency's legal interpretations, policies, or priorities in a manner that binds or limits the discretion of agency staff,[22] or otherwise through "pronouncements and communications having the contemplation and likely consequence of 'expected conformity.'"[23]

"Whether an agency action has 'direct and appreciable legal consequences' … is a 'pragmatic' inquiry."[24] That means courts analyze "the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it."[25] "[F]actors" relevant to that analysis "includ[e]: (1) 'the actual legal effect (or lack thereof) of the agency action in question on regulated entities'; (2) 'the agency's characterization of the guidance'; and (3) 'whether the agency has applied the guidance as if it were binding on regulated parties.'"[26] "The label that the particular agency puts upon its given exercise of administrative power is not … conclusive."[27]

Several recent cases demonstrate how numerous forms of agency action can give rise to legal consequences. For instance, in *Texas v. Cardona*, the district court held that Department of Education guidance—issued through a "Notice of Interpretation," a "Dear Educator Letter," and a "Fact Sheet"—concluding that Title IX prohibits discrimination on the basis of sexual orientation or gender identity was

[20] This is frequently accomplished through "legislative rules," which have the "force of law" and are generally the product of notice and comment rulemaking. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96–97 (2015). Below, this Issue Brief discusses the interplay between the related, yet distinct, analyses of whether agency action is final and whether it is a legislative rule.

[21] *See Hawkes*, 578 U.S. at 598; *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019) ("Another indication that an agency's action binds it and thus has legal consequences or determines rights and obligations is whether the document creates safe harbors protecting private parties from adverse action.").

[22] *Biden v. Texas*, 597 U.S. 785, 808–09 (2022); *see Texas*, 933 F.3d at 442 ("[A]ctions that retract an agency's discretion to adopt a different view of the law are binding.").

[23] *Nat'l Auto. Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 698 (D.C. Cir. 1971) (quoting *Abbott Lab'ys*, 387 U.S. at 150).

[24] *Sierra Club v. EPA*, 955 F.3d 56, 62 (D.C. Cir. 2020) (quoting *Hawkes*, 578 U.S. at 599).

[25] *California Communities*, 934 F.3d at 637.

[26] *Sierra Club*, 955 F.3d at 63 (quoting *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014)).

[27] *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995) (internal quotation marks omitted).

final agency action.[28] In the court's view, the guidance did "more than simply 'put the public on notice of pre-existing legal obligations'"; it "impose[d] new duties by 'changing the text' of the statute [it] 'profess[ed] to interpret.'"[29] In so doing, the guidance both bound "the Department and its employees to a particular legal position" and "create[d] significant legal consequences for Texas schools by purporting to authoritatively interpret the requirements of Title IX with the accompanying pledge to fully enforce the expanded interpretation."[30]

Similarly, a district court held that a Dear Colleague Letter issued by the Department of Education's new leadership, which contends that the Supreme Court's decision in *Students for Fair Admissions v. Harvard* renders "DEI programs" unlawful and promises "vigorous[] enforce[ment]," constitutes final agency action.[31] "The 2025 Letter instructs educational institutions to 'cease all efforts' that violate the Letter's prohibitions or else 'face potential loss of federal funding,' and makes clear that the Department's enforcement efforts will begin within weeks."[32] "Because the plaintiffs face substantial threat of legal consequences for failing to comply with the 2025 Letter, the actual legal effects component of the finality inquiry is satisfied."[33]

By contrast, in *ForUsAll v. Department of Labor*, the district court held that agency action was not final because it did not produce legal consequences. There, the Department of Labor's Employee Benefits Security Administration issued a Compliance Assistance Release "that questioned the prudence of exposing 401(k) plan participants to investments in cryptocurrencies and reminded retirement plan sponsors of their fiduciary duties under the Employee Retirement Income Security Act of 1974 ('ERISA')."[34] The Release "notif[ied] plans that the Department 'expects to conduct an investigative program'" and "remark[ed] that fiduciaries 'responsible for overseeing such investment options or allowing such investments through

[28] 743 F. Supp. 3d 824, 837 (N.D. Tex. 2024).

[29] *Id.* at 846 (alterations omitted) (quoting *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020), and *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 407 (D.C. Cir. 2020)).

[30] *Id.*

[31] *See Nat'l Educ. Ass'n v. Dep't of Educ.*, — F. Supp. 3d —, 2025 WL 1188160, at *15–17 (D.N.H. Apr. 24, 2025); Craig Trainor, Acting Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter:* SFFA v. Harvard (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf.

[32] *Id.* at *16.

[33] *Id.*

[34] 691 F. Supp. 3d 14, 19 (D.D.C. 2023).

brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above.'"[35]

The court concluded that "[n]o legal consequences flow[ed] from the Release" because it did not:

- "'tell regulated parties what they must do or may not do in order to avoid liability'";[36]
- "'command, require, order, or dictate' that plan fiduciaries refrain from offering cryptocurrency investment options or take any other action";[37]
- "withdraw discretion from the Department going forward by compelling certain enforcement actions"[38]; or
- "'announce[] a new interpretation of the regulations'" or "'effect[] a change in the regulations themselves.'"[39]

Instead, the Release was "'purely informational in nature,'" "'compelled no one to do anything,'" and "'had no binding effect whatsoever.'"[40] It "simply remind[ed] plans of their duties under ERISA, describe[d] the various risks associated with cryptocurrency investments, and communicate[d] the Department's position in a manner that [did] not bind regulated entities or the agency."[41]

* * *

"The law surrounding the APA's finality requirement is 'hardly crisp' and … 'lacks many self-implementing, bright-line rules, given the pragmatic and flexible nature of

[35] *Id.* at 21.

[36] *Id.* at 28 (quoting *Nat'l Mining Ass'n*, 758 F.3d at 252).

[37] *Id.* (alterations omitted) (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021–23 (D.C. Cir. 2000)).

[38] *Id.* at 28–29.

[39] *Id.* at 29 (quoting *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004)).

[40] *Id.* (quoting *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427).

[41] *Id.* The court also concluded that the Release did not represent the "'culmination of th[e] agency's consideration of [the] issue'" because "it was only the opening act, not the grand finale, of the Department's process of regulating the burgeoning cryptocurrency market." *Id.* at 27 (quoting *Wheeler*, 955 F.3d at 78).

the inquiry as a whole.'"[42] Litigants might take advantage of that doctrinal flexibility in arguing that particular agency actions are final.

III. TYPES OF FINAL AGENCY ACTION

A wide range of agency actions can qualify as final within the meaning of the APA. Below are several general considerations that litigants might note in determining whether agency action is sufficiently final, followed by a discussion of specific actions that may be final.

A. General Considerations

Final agency action can take many forms. First, it can be unwritten—an agency can make a definitive, consequential decision without reducing it to writing.[43] Litigants alleging the existence of an unwritten action might be able to obtain discovery into the "'contours of the precise policy at issue.'"[44] Second, final action "may result 'from a series of agency pronouncements rather than a single edict.'"[45] For example, "a preamble plus a guidance plus an enforcement letter from [an agency] could crystallize an agency position into final agency action."[46] And third, even agency

[42] *MediNatura*, 998 F.3d at 938 (quoting *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1027 (D.C. Cir. 2016)).

[43] *See, e.g.*, *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) (explaining that "the absence of a formal statement of the agency's position … is not dispositive" of the finality analysis); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) ("Agency action, however, need not be in writing to be final and judicially reviewable.").

[44] *Hisp. Affs. Proj. v. Acosta*, 901 F.3d 378, 388 (D.C. Cir. 2018) (quoting *Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359, 367 (D.C. Cir. 2005)); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 149 (D.D.C. 2018) (finding that plaintiffs had sufficiently alleged existence of policy, although "[d]iscovery may show otherwise"); *United Student Aid Funds, Inc. v. DeVos*, 237 F. Supp. 3d 1, 5 (D.D.C. 2017) (permitting admission of extra-record evidence regarding whether agency document announced a 'new rule').

[45] *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48–49 (D.C. Cir. 2000) (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 n.7 (D.C. Cir. 1986)).

[46] *Id.*

inaction can be final agency action if the agency's course of conduct amounts to a constructive denial of relief or a refusal to act — if it, "in practical effect if not formal acknowledgement," reflects a final decision.[47]

Moreover, as these examples above show, finality encompasses more forms of agency action than just notice-and-comment rules. "Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'"[48] "[A] legislative rule is thus necessarily final."[49] But agency action need not be a legislative rule to be final; "the finality analysis is distinct from the test for whether an agency action is a legislative rule."[50] Put practically, agency action can both represent the consummation of the agency's decisionmaking process and produce legal consequences even if an agency did not follow notice and comment procedures in issuing it.[51] But litigants might consider the close overlap between the analyses — a rule with sufficient legal effect to count as final may also be vulnerable to challenge if it was issued without notice and comment.[52]

The final agency action requirement also excludes "'broad programmatic attack[s]' on the government's operations," requiring litigants instead to "identify specific and discrete governmental conduct" to challenge.[53] That means litigants may not make

[47] *Friedman v. FAA*, 841 F.3d 537, 542 (D.C. Cir. 2016); *see also* 5 U.S.C. § 551(13) (defining agency "action" as including a "failure to act").

[48] *Perez*, 575 U.S. at 96 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)).

[49] *California Communities*, 934 F.3d at 635.

[50] *Id.*

[51] *See Appalachian Power Co.*, 208 F.3d at 1021 (agency "pronouncements" issued without notice and comment "can, as a practical matter, have a binding effect").

[52] *See* 33 Fed. Prac. & Proc. Judicial Review § 8361 (2d ed. Apr. 2025 update) ("[A]t least some interpretive rules qualify as 'final.' All this said, it bears stressing that courts sometimes determine that a rule that an agency has labeled as an interpretive rule or policy statement actually possesses the force of law of a legislative rule. In such cases, the rule will necessarily qualify as final and will be vulnerable to vacation if the agency improperly avoided notice and comment in its promulgation."); *Texas*, 743 F. Supp. 3d at 888–89 (finding that the legal effects that qualified the Department of Education's Title IX guidance as final agency action also rendered it a legislative rule for which notice and comment was required); *Nat'l Educ. Ass'n*, 2025 WL 1188160, at *28–29 (similar); *see also Notice and Comment, Part I: Legislative Rules and Guidance Documents*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[53] *City of New York v. Dep't of Defense*, 913 F.3d 423, 431 (4th Cir. 2019) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004)).

"'generic challenge[s]'" to "programmatic deficiencies"[54] or ask courts to superintend an agency's ongoing "management" of a program.[55] But that principle does not bar litigants from challenging discrete agency actions that apply program or agency-wide. For instance, the First Circuit recently emphasized, in holding the Trump administration's recent government-wide "funding freeze" to be final agency action, that "specific order[s] or regulation[s] … can of course be challenged under the APA" even where they apply "across the board."[56] Indeed, litigants may "criticize" an agency program and seek its "wholesale improvement" so long as "their actual challenge" is to a discrete, final action.[57]

B. Specific Categories

Beyond these general considerations, certain common categories of actions might frequently qualify as final.

Guidance Documents. Much agency action takes the form of "guidance." That term can refer to a broad range of agency pronouncements—letters to the public, particular sectors, or individual regulated entities; memoranda announcing legal determinations, interpretations, policies, or procedures; and documents as seemingly anodyne as postings, flyers, circulars, notices, fact sheets, and Q&As.

It is well-established that "a guidance document reflecting a settled agency position and having legal consequences for those subject to regulation may constitute 'final agency action.'"[58] Indeed, this Issue Brief has already discussed several examples of guidance that were held to satisfy the finality conditions. Guidance may be final because it announces a new legal interpretation with an explicit or implicit threat of enforcement—as with the Department of Education's pronouncements on the scope of Title IX and the effect of *Students for Fair Admission.* Conversely, guidance may

[54] *New York v. Trump*, 133 F.4th 51, 67 (1st Cir. 2025) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 n.2 (1990)).

[55] *Nat'l Veterans Legal Servs. Program v. DOD*, 990 F.3d 834, 841 (4th Cir. 2021).

[56] *New York*, 133 at 67–68 (quoting *Lujan*, 497 U.S. at 890 n.2).

[57] *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 591 (D.C. Cir. 2019).

[58] *Barrick Goldstrike Mines*, 215 F.3d at 48; *see also Frozen Food Express v. United States*, 351 U.S. 40, 43–45 (1956) (finding to be reviewable an Interstate Commerce Commission order listing commodities it considered exempt from regulation even though the action was purely interpretive and had not yet been implemented through an enforcement action).

extend a safe harbor from enforcement, as in *Hawkes*. Guidance may also be final if it limits the discretion of agency staff by giving them "marching orders" or through a binding legal interpretation.[59]

On the other hand, guidance that merely reiterates existing legal rights and obligations[60] or that is plainly tentative or nonbinding[61] is less likely to be final. Guidance that restates the law can still be final, though, where it triggers legal consequences. In *Rhea Lana v. Department of Labor*, for example, the D.C. Circuit held final a Department of Labor letter advising a business that it was violating the Fair Labor Standards Act by failing to pay certain volunteer employees.[62] Although the letter created "no new legal obligations"—it merely "restated" the FLSA's requirements, "tread[ing] no new ground"—it nevertheless produced "legal consequences."[63] The Court agreed with Rhea Lana that, by putting the business on notice that it was violating the law, the letter allowed "the Department [to] treat its continued nonpayment of … volunteers as a willful violation of DOL's regulations, thereby subjecting the company to civil penalties."[64] That "new exposure" counted as "a legal consequence."[65] In contrast, "purely informational" "workaday advice letters that agencies prepare countless times per year in dealing with the regulated community" are not final.[66]

A Fifth Circuit case, *Texas v. Equal Employment Opportunity Commission*, offers a laundry list of characteristics that can render guidance final agency action. There, the court categorized as final EEOC "Enforcement Guidance" declaring that "there is Title VII disparate impact liability" under certain circumstances "where the evidence shows that a covered employer's criminal record screening policy or practice

[59] *Pub. Emps. for Env't Responsibility v. NPS*, 2021 WL 1198047, at *9 (D.D.C. Mar. 30, 2021).

[60] *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purposes of judicial review."),

[61] *See, e.g.*, *ForUsAll*, 691 F. Supp. 3d at 28–29.

[62] 824 F.3d 1023 (D.C. Cir. 2016).

[63] *Id.* at 1028 (internal quotation marks omitted).

[64] *Id.* at 1028–29.

[65] *Id.* at 1029.

[66] *Indep. Equipment Dealers Ass'n*, 372 F.3d at 427.

disproportionately screens out a Title VII-protected group."[67] That was because the Guidance:

- was, undisputedly, "'the consummation of EEOC's decisionmaking process'"[68];
- "indicates that it binds EEOC staff to an analytical method in conducting Title VII investigations," "directs their decisions about which employers to refer for enforcement actions," "limits discretion respecting the use of certain evidence," and "leaves no room for EEOC staff *not* to issue referrals to the Attorney General when an employer uses a categorical felon-hiring ban"[69];
- "tells employers how to avoid Title VII disparate-impact liability" — "[i]n fact, the Guidance explicitly declares that it is intended to be a playbook for employers to use to avoid liability"[70]; and
- "open[s] the 'field of potential plaintiffs.'"[71]

For other types of agency action, the finality analysis might be simpler. For example:

Funding Decisions. Agency action to pause, terminate, or claw back funding awards is likely final. The withholding of funds — however characterized — is a definitive act with obvious legal effect. Courts adjudicating recent challenges to Trump administration funding freezes and impoundments have had little trouble categorizing those actions as final[72] — indeed, in some cases, courts have found the

[67] 933 F.3d at 437–38.

[68] *Id.* at 441 (alteration omitted) (quoting *Bennett*, 520 U.S. at 178).

[69] *Id.* at 443.

[70] *Id.* at 443–44.

[71] *Id.* at 443 (quoting *Hawkes*, 578 U.S. at 599); *see also Texas v. Becerra*, 89 F.4th 529, 533, 538–41 (5th Cir. 2024) (following *EEOC* in concluding that federal "guidance on [the Emergency Medical Treatment and Active Labor Act of 1986] requirement that physicians must provide an abortion when that care is the necessary stabilizing treatment for an emergency medical condition" was final agency action).

[72] *See, e.g.*, *New York v. Trump*, — F. Supp. 3d —, 2025 WL 715621, at *8–9 (D.R.I. Mar. 6, 2025); *Nat'l Council of Nonprofits v. OMB*, — F. Supp. 3d —, 2025 WL 597959, at *13 (D.D.C. Feb. 25, 2025); *Massachusetts v. NIH*, — F. Supp. 3d —, 2025 WL 702163, at *15 (D. Mass. Mar. 5, 2025).

finality requirement satisfied without analysis.[73] Importantly, it does not matter for the finality analysis whether an agency purports to "pause" funding on a temporary or interim basis. As noted above, "[t]he mere possibility that an agency might reconsider … does not suffice to make an otherwise final agency action nonfinal."[74]

Personnel Decisions. Agency personnel decisions can count as final agency action. Courts have recently found that the Trump administration's efforts to lay off federal workers *en masse* constitute final agency action.[75] But less dramatic personnel actions might also count as final. For instance, in *Harris v. FAA*, the D.C. Circuit found to be final a 1993 notice that air traffic controllers fired by President Reagan were eligible to be rehired at a reduced pay grade.[76] It was an "'unequivocal statement of the agency's position,'" and, as "the FAA's formal offer of employment," had legal effect.[77]

Information Disclosure and Data Access. Much recent litigation has alleged that agencies have improperly disclosed sensitive, legally protected information or have otherwise granted data access to agency outsiders — principally members of the U.S. DOGE Service. Courts have found that the disclosure of information can constitute final agency action.[78] For instance, a district court classified as final the Social Security Administration's "unprecedented decision to provide the DOGE Team with non-anonymized access to virtually all [agency] records."[79] The court relied on a D.C. Circuit decision, *Venetian Casino Resort, LLC v. EEOC*, which held that the EEOC's "policy … permit[ting] [agency] employees to disclose an employer's confidential information to potential … plaintiffs" constituted final agency action.[80] There, the court took it essentially as a given that "disclos[ing] confidential information without

[73] *Pacito v. Trump*, — F. Supp. 3d —, 2025 WL 893530, at *7 (W.D. Wash. Mar. 24, 2025); *Aids Vaccine Advocacy Coalition v. Dep't of State*, — F. Supp. 3d —, 2025 WL 752378, at *7 (D.D.C. Mar. 10, 2025).

[74] *Sackett*, 566 U.S. at 127.

[75] *See, e.g.*, *Maryland v. USDA*, — F. Supp. 3d —, 2025 WL 800216, at *11 (D. Md. Mar. 13, 2025); *AFGE v. OPM*, 2025 WL 660053, at *5 (N.D. Cal. Feb. 28, 2025).

[76] 353 F.3d 1006, 1010–11 (D.C. Cir. 2004).

[77] *Id.* (quoting *Reliable Automatic Sprinkler Co. v. Consumer Prods. Safety Comm'n*, 324 F.3d 726, 734 (D.C. Cir. 2003)).

[78] *AFT v. Bessent*, — F. Supp. 3d —, 2025 WL 895326, at *19 n.17 (D. Md. Mar. 24, 2025); *AFSCME v. SSA*, — F. Supp. 3d —, 2025 WL 868953, at *50–51 (D. Md. Mar. 20, 2025); *New York v. Trump*, — F. Supp. 3d —, 2025 WL 573771, at *18–21 (S.D.N.Y. Feb. 21, 2025).

[79] *AFSCME*, 2025 WL 868953, at *50.

[80] 530 F.3d 925, 927, 931 (D.C. Cir. 2008).

notice is … a 'consummation of the agency's decisionmaking process,' and 'one by which [the submitter's] rights [and the agency's] obligations have been determined."[81]

Agency Relocation. The first Trump administration sought to move certain agency offices out of the Washington, D.C. metropolitan area, and the current administration is exploring further agency relocation. Several courts have found that decisions regarding agency and office locations can qualify as final.[82] Once an agency decides on a relocation, that is generally definitive and consequential act. Relocation "unquestionably has practical and legal effects and sets forth the [agency's] … obligations."[83] Beyond the legal consequences for the agency, litigants might argue that relocation affects, among other things, employees' and agency vendors' contractual commitments, the legal rights of entities and individuals with business before the agency, and the jurisdictions from which agencies are departing.[84]

Other Actions in Individual Cases. Federal agencies routinely adjudicate cases, decide applications for permits and licenses, and issue orders. Such individualized decisions can frequently count as final. Indeed, two of the Supreme Court's recent finality decisions, *Hawkes* and *Sackett*, involved agency decisions issued to individuals under the Clean Water Act—respectively, an Army Corps of Engineers jurisdictional determination and an EPA compliance order.[85] As discussed above, orders like those in *Hawkes* and *Sackett* are frequently definitive statements of an agency's position and can be quite consequential by, for instance, imposing liability on or requiring action by an entity or individual. Of course, the factual and legal circumstances surrounding particular agency actions can vary tremendously, and litigants might consider how the "flexible" doctrine of finality applies to a particular agency action.

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[81] *Id.* (quoting *Bennett*, 520 U.S. at 177–78).

[82] *See Tinian Women Ass'n v. Dep't of the Navy*, 2017 WL 4564188, at *6–7 (D.N. Mar. I. Oct. 13, 2017); *City of Reading v. Austin*, 816 F. Supp. 351, 357 (E.D. Pa. 1993); *see also Jane D. v. SSA*, 1987 WL 25625 (E.D. La. Nov. 30, 1987) (concluding that agency's relocation decision was unlawful without addressing final agency action).

[83] *Tinian Women Ass'n*, 2017 WL 4564188, at *7.

[84] *See Challenging Agency Relocations*, Governing for Impact (Mar. 2025), https://governingforimpact.org/wp-content/uploads/2025/03/Challenging-Agency-Relocations.pdf.

[85] *Hawkes*, 578 U.S. at 597; *Sackett*, 566 U.S. at 126.

IV. CONCLUSION

Many agency actions are "final" within the meaning of Section 704 of the APA. Litigants might therefore consider the full range of agency policies and decisions that count as final in challenging the Trump administration's agenda. That might be an especially urgent task in light of the Trump administration's expressed intention to avoid the archetypal form of final agency action, notice and comment rulemaking.