

# DOJ's New Affirmative Litigation Branch: What It Means for Companies Caught in the Crossfire

## Client Alerts

November 4, 2025

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The Department of Justice has quietly created a new power center that will expand its ability to pursue investigations and bring politically charged lawsuits against both corporations and state actors. For companies navigating federal scrutiny across multiple regulatory fronts—from consumer protection to immigration—this shift could reshape how enforcement risk manifests in 2026 and beyond. Below, we discuss what this shift means—and how your organization should be preparing in anticipation of additional changes to come.

## [What is the Enforcement & Affirmative Litigation Branch, and what has changed within the Civil Division?](#)

The Department of Justice's Civil Division is vested with significant authority to bring civil, as well as criminal, enforcement actions.<sup>1</sup>

Until recently, that authority was spread across multiple offices within the Division:

- The **Consumer Protection Branch** was charged with enforcing the federal Food, Drug, and Cosmetic Act (FDCA) through both civil and criminal actions, while also enforcing a number of other consumer protection statutes.<sup>2</sup>
- The **Federal Programs Branch** was authorized to bring affirmative litigation enforcing federal statutory and regulatory programs, including seeking relief against policies that interfered with federal functions (known as federal preemption actions), though such affirmative lawsuits made up only a small portion of that Branch's work.<sup>3</sup>
- The **Office of Immigration Litigation** was authorized to bring affirmative cases challenging state and local policies that obstructed federal agencies' immigration enforcement, though it exercised that authority infrequently.<sup>4</sup>

These functions are now consolidated within the new Enforcement & Affirmative Litigation Branch, which Assistant Attorney General Brett Shumate described as a single, “highly specialized branch” that “reflects the Department’s commitment to aggressively protecting consumers and advancing the interests of the United States.”<sup>5</sup> By bringing together many of the Division’s civil enforcement experts into a single group, the launch of the new Branch not only signals increased focus and attention on affirmative litigation, but inevitably means more resources will be devoted to such cases.<sup>6</sup> Under the prior model, many Civil Division attorneys bringing affirmative cases had significant defensive caseloads as well. The new Branch’s dedicated staff of attorneys devoted solely to affirmative litigation will undoubtedly expand DOJ’s capacity for pursuing such cases.

Notwithstanding the reorganization, cases arising under the False Claims Act will continue to be the responsibility of the Civil Fraud Section, within the Civil Division’s Commercial Litigation Branch.<sup>7</sup>

### How does this reorganization fit into DOJ’s broader priorities?

To fully understand its impact, this reorganization should be viewed through the lens of DOJ’s existing efforts to use affirmative litigation to advance its aims.

*First*, this summer, Civil Division leadership issued an enforcement priorities memo, directing attorneys to “prioritize investigations and enforcement actions” that advance the following administration priorities<sup>8</sup> :

- Combatting **allegedly discriminatory practices**, including DEI and other diversity-related policies and programs deemed inconsistent with civil-rights laws;
- Ending **antisemitism**;
- Preventing the provision of **gender-affirming care**, especially to minors;
- Blocking state or local laws or policies that “facilitate **violations of federal immigration laws** or impede lawful federal immigration operations”; and
- Aggressively pursuing **revocation of citizenship** for individuals alleged to have procured naturalization “illegally” or through “misrepresentation.”

Many of these priorities now fall squarely within the Enforcement & Affirmative Litigation Branch’s responsibilities.

*Second*, the Civil Division has already demonstrated its willingness to assert novel claims and pursue unconventional strategies in affirmative cases. For example, over the past six months, DOJ has pursued aggressive cases on a variety of priority topics:

- **Immigration:** The Civil Division filed a lawsuit naming as defendants all active federal judges in the District of Maryland, challenging that Court’s standing order in immigration habeas cases. A district judge sitting by designation dismissed the case, describing it as “novel and potentially calamitous litigation”; an appeal is now pending.<sup>9</sup> The Division has also filed lawsuits challenging as preempted state laws that allow undocumented individuals to pay in-state tuition at universities, including obtaining a settlement with Texas within hours of suing them.<sup>10</sup> And the Division has continued to file lawsuits against state and local jurisdictions, including Colorado and Minnesota, for alleged “sanctuary jurisdiction” policies.<sup>11</sup>
- **Gender-Affirming Care:** The Civil Division has issued subpoenas to doctors and clinics that provide gender-affirming care to patients under 19 as part of their investigations into alleged “healthcare fraud, false statements,” and the FDCA.<sup>12</sup> Courts have quashed several of these subpoenas, with one judge accusing DOJ of issuing the subpoenas “not to investigate legal violations but to intimidate and coerce providers into abandoning lawful medical care.”<sup>13</sup>
- **Second Amendment:** DOJ filed its first-ever “affirmative lawsuit in support of gun owners,” arguing that the Los Angeles County Sheriff’s Department was unlawfully delaying issuance of concealed carry permits.<sup>14</sup> Although this lawsuit was filed by the Civil Rights Division (not the Civil Division), it is emblematic of DOJ’s broader willingness to pursue novel lawsuits on priority issues.

Collectively, the creation of the new Enforcement & Affirmative Litigation Branch, the Civil Division’s new enforcement priorities, and the lawsuits and investigations launched in recent months all demonstrate DOJ’s willingness to embrace affirmative litigation as a tool for pursuing policy priorities of the current administration.

### What effect will this have on the federal government’s affirmative litigation generally?

We expect the new Enforcement & Affirmative Litigation Branch will impact DOJ’s affirmative litigation practice in a number of ways.

#### **(1) Expect more affirmative litigation**

Once the federal government shutdown ends, the new Branch means the Civil Division will have more resources and ability to pursue affirmative litigation, including preemption lawsuits as well as investigations on subjects important to DOJ leadership. And as noted above, the enforcement priorities memo could prompt this Branch to expand into new areas not typically the subject of affirmative Civil Division enforcement, such as federal antidiscrimination statutes. A dedicated staff, the attention of DOJ leadership, and a mandate to enforce a number of top administration priorities means we are likely to see affirmative litigation expand in both scope and frequency.

#### **(2) Expect more “policy-through-enforcement” actions targeting private industry**

Civil litigation will continue to be used as a tool for policy victories, including in unconventional ways. As noted above, the Civil Division is already pursuing novel affirmative cases, and the new Branch will likely continue that trend. Notably, the press release describing the Affirmative Litigation Section specifically notes the possibility of litigation “against states, municipalities, *and private entities* that interfere with or obstruct federal policies.”<sup>15</sup> Pursuing affirmative lawsuits against private individuals or entities because they are obstacles to federal objectives would be a novel step, at least in modern times.<sup>16</sup> But DOJ has already demonstrated its willingness to pursue aggressive legal theories, and this new Branch—with greater resources for examining a broader range of conduct as potential targets—would certainly facilitate these efforts.

### **(3) Expect increased federal participation in private litigation**

The Civil Division may also expand its practice of filing amicus briefs or Statements of Interest in the lower courts. DOJ routinely files amicus briefs in cases pending before the Supreme Court, but that practice is much less common in the lower courts—that is in part because, traditionally, there are no attorneys dedicated to monitoring and evaluating potential cases for participation. We can expect this new Branch to be monitoring ongoing cases implicating federal interests and administration priorities to a greater degree, and even coordinating with private litigants who are pursuing administration priorities through litigation. Thus, this new Branch might expand the frequency with which DOJ seeks to influence the outcome of cases in the lower courts through amicus filings or Statements of Interest, including on the topics discussed above or other administration priorities.

### **(4) Effects on criminal enforcement of consumer protection laws are less clear**

It remains to be seen the extent to which the new Branch will pursue criminal offenses under the relevant consumer protection statutes, or whether much of that work will now shift to the Criminal Division and local US Attorney’s Offices. This uncertainty means that companies and individuals should no longer assume that any investigation under these statutes will be run by specialized prosecutors in Washington, D.C.; there may be substantially more variability in investigative and charging practices if these investigations are being pursued within local US Attorney’s Offices or the general Criminal Division. Moreover, this overlapping jurisdiction between offices could create its own wrinkles—with companies, particularly those that operate nationwide, perhaps needing to interact with and satisfy multiple enforcing offices.

### Recommended Strategies for Clients

If your organization implements policies that could be—or could be perceived to be—obstacles to federal priorities, it is important to anticipate and prepare for investigations and litigation. Immigration may be one area of particular focus, but there are a number of other priorities too, as discussed above. Counsel can advise on how to scope and implement policies to mitigate litigation risk and guide your organization through defending any challenged policy in litigation. But don’t wait

for DOJ to come calling—companies and other institutions should consider the following steps to navigate this evolving landscape:

### **(1) Reaffirm and document your policies to preserve attorney-client privilege**

Privilege disputes are increasingly being used as leverage in politically charged cases. Now is the time to ensure that your organization has clear guidance to preserve attorney-client privilege. Consider separate channels for legal assessments of business decisions to avoid mixing them with ordinary business discussions that can weaken privilege assertions. Provide employees, compliance officers, and in-house counsel with updated, written guidance on how to maintain attorney-client privilege and work-product protection during investigations or policy-driven inquiries. Prepare and distribute this guidance *before* an enforcement action begins.

### **(2) Conduct a forward-looking “DOJ exposure audit”**

Identifying and anticipating your risk factors can help avoid, or at least mitigate the risk, associated with DOJ enforcement activity. Map where your organization’s activities intersect with current Administration priorities—*e.g.*, diversity efforts, health care, ESG disclosures, climate change, immigration, or consumer protection. Identify any policies or programs that could be portrayed as “obstructing” federal objectives and ensure that you have a clear understanding of their legitimate business purpose and compliance rationale. Additionally, consider the extent to which your actions depend on particular state or local laws, which could be the subject of their own federal challenge.

### **(3) Scenario-plan for enforcement actions with a political overlay**

Preparation is key. Simulate investigations that might arise from politically salient issues (*e.g.*, provision of or other support for gender-affirming care, climate-related policies, or immigration-related employment practices). You can use tabletop exercises to test how leadership, legal, and communications teams coordinate responses. In particular, this sort of preparation can help ensure that your organization understands who the decisionmakers will be when a government enforcement action touches legal, communications, government relations, and the business itself.

### **(4) Monitor DOJ’s public filings and statements of interest**

Some companies are already engaging external counsel to track where the new Enforcement & Affirmative Litigation Branch is filing briefs or intervening in civil cases. Early identification of trends can help anticipate which industries or theories are next in line for “affirmative” investigation or enforcement. Consider whether your organization may benefit from a more structured, less ad hoc, monitoring effort.

### **(5) Review insurance coverage and indemnification**

Evaluate your organization’s indemnification provisions and management and company liability insurance policies to determine whether they account for the types of “policy-through-

enforcement” actions the new Branch may pursue. Not all liability insurance policies contain coverage for government enforcement actions that take the form of inquiries and investigations, rather than lawsuits, and those that do often draw fine distinctions as to which enforcement authorities are covered, what type of initiating documentation is required, and to whom the inquiry or investigation must be directed in order to be covered. An additional issue can arise with respect to regulatory investigations and enforcement actions brought “in the public interest,” which can leave gaps in coverage for politically charged civil suits or subpoenas that do not allege traditional wrongful acts. In some cases, it may be advisable to seek endorsements to existing policies mid-term or seek expanded policies at renewal to specifically address investigations or enforcement actions by DOJ’s Civil Division.

## **(6) Consider how to use the Branch to your advantage**

It’s not all bad news. Litigants in existing cases should consider whether an amicus brief or Statement of Interest from the United States would be helpful in advancing their legal position. DOJ has previously filed Statements of Interest in a broad range of private litigation—*e.g.*, addressing ERISA preemption, the proper scope of employment discrimination laws, whether news platforms are subject to antitrust liability for allegedly suppressing “viewpoint competition,” and preemption of state safety standards with respect to gas and oil pipelines.<sup>17</sup> Whether the government’s participation would be useful in any particular case will likely depend on several factors, including the court, the subject matter of the litigation, the procedural posture, and the degree to which the case implicates specific interests of the United States. But this new Branch creates an opening to solicit the United States’ involvement in cases where it would be beneficial.

## **Footnotes**

[1] *See generally* 28 C.F.R. § 0.45 (describing the matters delegated to the Civil Division).

[2] 28 C.F.R. § 0.45(j); Justice Manual § 4-8.000. The Consumer Protection Branch exercised such authority concurrently, and sometimes in conjunction, with US Attorneys’ Offices across the country.

[3] 28 C.F.R. § 0.45(h); Justice Manual § 4-6.300.

[4] 28 C.F.R. § 0.45(k); *see also, e.g., United States v. Russell*, No. 1:25-cv-2029 (D. Md. filed June 24, 2025).

[5] DOJ, Press Release, *The Department of Justice Creates New Civil Division Enforcement & Affirmative Litigation Branch* (Sept. 25, 2025), <https://www.justice.gov/opa/pr/department-justice-creates-new-civil-division-enforcement-affirmative-litigation-branch>.

[6] *See, e.g.,* Declaration of Lisa K. Hsiao, Acting Director, Enforcement and Affirmative Litigation Branch, *In re Administrative Subpoena No. 25-1431-019*, No. 1:25-mc-91324-MJJ, ECF No. 37 ¶ 44 (D. Mass. filed Oct. 7, 2025) (explaining that “[s]ubstantial government resources,” including work by “several veteran, career prosecutors with many decades of experience in healthcare fraud and FDCA enforcement” alongside “agents and analysts” from the FBI, have been devoted to an investigation into Boston Children’s Hospital over allegations that its provision of gender-affirming care violates the FDCA).

[7] 28 C.F.R. § 0.45(d); Justice Manual § 4-4.110.

[8] Memorandum to All Civil Division Employees from Brett A. Shumate, Assistant Attorney General, *Civil Division Enforcement Priorities* (June 11, 2025), available at <https://www.justice.gov/civil/media/1404046/dl?inline>.

[9] *United States v. Russell*, --- F. Supp. 3d ----, No. 1:25-CV-02029, 2025 WL 2448955, at \*2 (D. Md. Aug. 26, 2025).

[10] DOJ, Press Release, *The Justice Department, Texas Reach Agreement to End In-State Tuition for Illegal Aliens* (June 5, 2025), <https://www.justice.gov/opa/pr/justice-department-texas-reach-agreement-end-state-tuition-illegal-aliens>; see also *United States v. Illinois*, No. 25-cv-1691 (S.D. Ill. filed Sept. 2, 2025).

[11] See, e.g., DOJ, Press Release, *Justice Department Sues Minnesota Over Sanctuary Policies* (Sept. 29, 2025), <https://www.justice.gov/opa/pr/justice-department-sues-minnesota-over-sanctuary-policies>; First Amended Complain, *United States v. Colorado*, 1:25-cv-01391-GPG-KAS (D. Colo., July 25, 2025).

[12] DOJ, Press Release, *Department of Justice Subpoenas Doctors and Clinics Involved in Performing Transgender Medical Procedures on Children* (July 9, 2025), <https://www.justice.gov/opa/pr/department-justice-subpoenas-doctors-and-clinics-involved-performing-transgender-medical>; see also Declaration of Lisa K. Hsiao, Acting Director, Enforcement and Affirmative Litigation Branch, *In re Administrative Subpoena No. 25-1431-019*, No. 1:25-mc-91324-MJJ, ECF No. 37 44 (D. Mass. filed Oct. 7, 2025) (explaining that “[s]ubstantial government resources,” including work by “several veteran, career prosecutors with many decades of experience in healthcare fraud and FDCA enforcement” alongside “agents and analysts” from the FBI, have been devoted to an investigation into Boston Children’s Hospital over allegations that its provision of gender-affirming care violates the FDCA).

[13] Order at 6, *QueerDoc, PLLC v. US Department of Justice*, No. 2:25-mc-00042 (W.D. Wash. Oct. 27, 2025). See also Memorandum of Decision, *In Re: Administrative Subpoena*, No. 1:25-mc-91324 (D. Mass. Sept. 9, 2025).

[14] DOJ, Press Release, *Civil Rights Division Files the First Department of Justice Affirmative Lawsuit in Support of Gun Owners* (Sept. 30, 2025), <https://www.justice.gov/opa/pr/civil-rights-division-files-first-department-justice-affirmative-lawsuit-support-gun-owners>.

[15] Note 5, *supra* (emphasis added).

[16] See, e.g., *In re Debs*, 158 US 564, 584 (1895) (“Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other[.]”).

[17] See *Enbridge Energy v. Whitmer*, No. 1:20-cv-1141-RJJ-RSK (W.D. Mich.), ECF No. 140 (filed Sept. 12, 2025) (preemption for gas and oil pipelines); *Bernier v. Turbocam, Inc.*, No. 1:23-cv-523-LM-AJ (D.N.H.), ECF No. 70 (filed Aug. 15, 2025) (application of Americans with Disabilities Act and Title VII to employee insurance plans); *Children’s Health Defense v. WP Company*, No. 1:23-cv-2735-TJK (D.D.C.), ECF No. 123 (filed July 11, 2025) (antitrust law’s application to viewpoint competition in news marketplace); *Howard Jarvis Taxpayers Ass’n v. Calif. Secure Choice Retirement Savings Program*, No. 2:18-cv-1584-MCE-KJN (E.D. Cal.), ECF No. 43 (filed Sept. 13, 2019) (ERISA preemption).

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