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**BLOG**

# Compliance and Risk Considerations – Executive Order on Climate-Related Financial Risks

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On May 20, 2021, President Biden signed Executive Order 14030 (EO 14030).[1] Stating that the “intensifying impacts of climate change present physical risk to assets, publicly traded securities, private investments, and companies,” EO 14030 seeks to increase disclosure of climate-related financial risk by both the public sector and private sector. As a result, we can expect expanding disclosure and reporting obligations regarding climate-related risks and enhanced scrutiny of organizations subject to those obligations. A thorough understanding of what to expect from EO 14030’s call for a comprehensive, government-wide consideration of climate change-related financial risks, and how the Order may impact existing federal programs is critical to mitigating risk and ensuring compliance.

**Summary of Executive Order 14030:**

President Biden’s EO 14030 calls for “a comprehensive, [g]overnment-wide strategy” on climate-related financial risk.

***First***, the Order directs White House policymakers to develop a strategy for identifying and disclosing climate-related financial risk to government programs, assets, and liabilities within 120 days. This strategy is to identify the public and private financing needed to reach economy-wide, net-zero emissions by 2050. Its goal is to limit global average temperature rise to 1.5 degrees Celsius.

***Second***, the Order tasks the Financial Stability Oversight Council (FSOC) and its member agencies to assess climate-related financial risk to the federal government and the overall U.S. financial system. It asks FSOC members “to consider” reporting recommendations in 180 days to reduce such risks to financial stability. The recommended discussion may include: the necessity of enhanced climate-related disclosure by regulated entities to mitigate risk to the financial system; actions FSOC agencies are now taking on climate-related disclosures; and new regulations for identifying and mitigating such risks.

***Third***, the Order directs the Department of Labor to identify regulatory actions under ERISA and the Federal Employee Retirement System Act to assess the threats that climate risk may have to savings and pension plans. This includes reconsidering rules that prohibit investment firms from considering environmental, social, and governance (ESG) factors, including climate-related risks, in investment decisions related to workers’ pensions. The Order directs the Labor Department to report on these and other measures that might be implemented within 180 days, including how the Federal Retirement Thrift Investment Board has taken ESG factors into account.

***Fourth***, the Order asks White House policymakers for recommendations for incorporating climate-related financial risk into federal management and reporting, "especially" federal lending programs. These should include new accounting standards for federal financial reporting of such risks. The Order also directs the Federal Acquisition Regulatory Council to consider amendments to the Federal Acquisition Regulation to require that major federal suppliers "publicly disclose greenhouse gas emissions, and climate-related financial risk, and to set science-based reduction targets." The Order encourages agencies to examine the use of the social cost of greenhouse gas emissions in procurement decisions. Similarly, lending and grant agencies like Agriculture, Housing and Urban Development, and Veterans Affairs are to consider integrating such risk assessment into their lending policies and programs.

EO 14030 extends other recent federal efforts to increase consideration of climate-related risks in the financial system. In September 2020, the Commodities Futures Trading Commission issued a subcommittee report on *Managing Climate Risk in the U.S. Financial System*.[2] In early-March 2021, the SEC then announced the creation of a Climate and ESG Task Force in the Division of Enforcement.[3] This included a call for submission of "ESG related tips, referrals and whistleblower complaints." Later that month, the SEC requested public comment on potential changes to climate risk reporting, and on ESG disclosures more generally. A Public Statement by Acting Chair Allison Herren Lee outlined 15 detailed questions to guide public comment, available at https://www.sec.gov/news/public-statement/lee-climate-change-disclosures. **Comments must be submitted by June 14, 2021**.

The Federal Reserve also established two committees to evaluate climate-related financial risk. This includes a Supervision Climate Committee, formed in January 2021.[4] This committee is examining how climate change affects individual banks supervised by the Federal Reserve. In March, the Federal Reserve then announced a Financial Stability Climate Committee. This committee is tasked with identifying and addressing climate-related risks at a macroprudential level.

On May 28, after signing EO 14030, President Biden sent his FY 2022 budget to Congress. This includes $44.0 million in new resources for DOJ "to advance environmental justice, tackle climate change, and enhance environmental stability."[5]

**Key Takeaways**

- EO 14030 directs federal agencies to pursue policy and regulatory processes that may create significant, new accounting and reporting obligations, increase compliance obligations, and create enforcement and litigation risks for private firms across numerous industry sectors.
- Beyond financial disclosure obligations, as the federal government announces more regulatory standards, consumer-facing advertising and other claims about climate change and "sustainability" may be subject to enhanced scrutiny for "greenwashing" by federal regulators such as the FTC, the DOJ, state attorneys generals, and private litigants.[6] This may give rise to an increase in claims under various consumer protection statutes.
- Accounting and disclosure changes to ERISA and FAR may generate collateral risk and litigation for companies that do business with or receive funding from federal agencies. The government is likely to make use of the False Claims Act to pursue investigations and claims involving alleged failure to comply with disclosure and reporting requirements. Similarly, whistleblowers are likely to employ the *qui tam* provisions of the FCA to bring actions on behalf of the government and share in any recovery.
- New disclosure and reporting requirements from federal financial regulators on ESG, including specifically climate change, should be incorporated into existing compliance programs. In order to meet these new requirements, additional or enhanced data-gathering, regarding new streams of information, may be required.
- Before formal regulatory changes are adopted, *current* legal and regulatory standards based on "reasonable" standards of conduct may immediately begin receiving expanded interpretation by regulators, enforcement agencies, or private litigants. The DOJ, SEC, CFPB, and state and local regulators may take the position that current or past conduct is subject to obligations to consider and account for climate-related financial risks. Organizations should consider this risk in assessing current and prior conduct and the benefits of timely implementation of any necessary remediation measures.

For further information or questions on Presidential Executive Order 14030 and its implications, including the expected creation of new obligations and other corresponding federal policy changes and related compliance and litigation risks, please contact **Jonathan D. Brightbill** (Partner, White Collar, Regulatory Defense & Investigations), **Suzanne Jaffe Bloom** (Co-Chair, White Collar, Regulatory Defense & Investigations), members of the Winston & Strawn ESG Advisory Team, including Co-Chairmen **Mike Blankenship** and **Eric Johnson**, or your Winston relationship attorney.

*We note that government orders on the federal, state, and local level are changing every day, and the information contained herein is accurate only as of the date set forth above.*

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[1] *Executive Order 14030*, 86 Fed. Reg. 27,968 (May 25, 2021), available at https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11168.pdf

[2] *Managing Climate Risk in the U.S. Financial System* (Sept. 9, 2020), available at https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf

[3] *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (Mar. 4, 2021), available at https://www.sec.gov/news/press-release/2021-42

[4] *Financial Stability Implications of Climate Change* (Mar. 23, 2021), available at https://www.federalreserve.gov/newsevents/speech/brainard20210323a.htm

[5] Press Release: Department of Justice Fiscal Year 2022 Funding Request, available at https://www.justice.gov/opa/pr/department-justice-fiscal-year-2022-funding-request

[6] Earthworks (Mar. 16, 2021), *Chevron faces unprecedent complaint over misleading consumers on climate action*, available at https://www.earthworks.org/chevrongreenwashing/

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