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BLOG

FAR Council Proposal for Climate-Related Disclosures and the False Claims Act

OCTOBER 21, 2021

Last week, the federal government took another step toward considering the greenhouse gas emissions of suppliers when deciding major Federal agency procurements. It proposed amendments to the Federal Acquisition Regulation ("FAR") that would require consideration of the social cost of carbon, and commitments to reduce or mitigate greenhouse gas emissions, in connection with awarding federal contracts. The False Claims Act ("FCA") provides both the government and private litigants suing on the government's behalf with a powerful tool to enforce compliance with these new initiatives. Affected entities should submit comments on or before December 14, 2021.

Background

On October 15, 2021, the Federal Acquisition Regulatory Council ("FAR Council"), which assists in the direction and coordination of government-wide procurement policy and government-wide procurement regulatory activities, issued an Advanced Notice of Proposed Rulemaking. This proposes to amend the FAR. The FAR regulates the acquisition of supplies and services for all executive agencies. The proposed rule seeks to amend the FAR to mandate consideration of climate change and the social cost of carbon in major federal agency procurements.[1] The Council includes the U.S. Department of Defense, General Services Administration, and NASA.

The FAR Council is responding to President Biden's Executive Order 14030, issued in May.[2] In EO 14030, President Biden called for "a comprehensive, [g]overnment-wide strategy" on climate-related financial risk.[3] EO 14030 seeks to increase the disclosure of climate-related financial risk by both the public sector and private sector. By incorporating climate considerations into the FAR, the FAR Council said the federal government can "leverag[e] its scale as the Nation's largest spender to speed the adoption of key assessment, disclosure, and mitigation measures across the private sector."[4]

The FAR Council Request For Public Comment

The FAR Council welcomes general input from the public on these potential amendments. It also seeks feedback on eight specific questions:

a. How can greenhouse gas emissions, including the social cost of greenhouse gases, best be qualitatively and quantitatively considered in Federal procurement decisions, both domestic and overseas? How might this vary across different sectors?

b. What are usable and respected methodologies for measuring the greenhouse gases emissions over the lifecycle of the products procured or leased, or of the services performed?

c. How can procurement and program officials of major Federal agency procurements better incorporate and mitigate climate-related financial risk? How else might the Federal Government consider and minimize climate-related financial risks through procurement decisions, both domestic and overseas?

d. How would (or how does) your organization provide greenhouse gas emission data for proposals and/or contract performance?

e. How might the Federal Government best standardize greenhouse gas emission reporting methods? How might the Government verify greenhouse gas emissions reporting?

f. How might the Federal Government give preference to bids and proposals from suppliers, both domestic and overseas, to achieve reductions in greenhouse gas emissions or reduce the social cost of greenhouse gas emissions most effectively?

g. How might the Government consider commitments by suppliers to reduce or mitigate greenhouse gas emissions?

h. What impact would consideration of the social cost of greenhouse gases in procurement decisions have on small businesses, including small disadvantaged businesses, women-owned small businesses, service-disabled veteran-owned small businesses, and Historically Underutilized Business Zone (HUBZone) small businesses? How should the FAR Council best align this objective with efforts to ensure opportunity for small businesses?

The FAR Council asked that the public submit any comments by December 14, 2021 in order to be considered in the formation of the proposed rule.

Potential FCA Liability Related to the Proposed FAR Amendments

Compliance with the FAR is subject to enforcement through the FCA. This is one of the government's most powerful tools for uncovering and punishing fraud against the government. The FCA prohibits the knowing submission of false claims to the government and provides for treble damages and steep penalties for violations. Further, the *qui tam* provisions allow private plaintiffs to sue for FCA violations on the government's behalf.

The incorporation of certain climate-related metrics into the FAR is likely to give rise to an increase in both the government's and ***qui tam* plaintiffs' use of the FCA to enforce federal contracting requirements**. Accordingly, federal contractors should remain vigilant and take steps to ensure strict compliance with the FAR, including any new climate change-related requirements and disclosures that may result from the FAR Council's proposed amendments.

Other Climate-Related Enforcement Initiatives

Other federal regulators are considering regulatory changes to enhance the role that climate-related and ESG considerations play in federal financial and consumer protection programs. Federal enforcement of climate-related and ESG requirements is already occurring. For example:

- Last month, the SEC announced that it was reviewing public company climate-related financial and ESG disclosures, and requiring companies to explain any perceived discrepancies.[5] It is publicly reported that a major international bank is subject to DOJ and SEC investigation for sustainability claims.
- Private parties are filing suits against companies making climate-related, sustainability, and other ESG claims. Two securities class actions recently filed in the Federal District Court for the Southern District of New York alleged

that an innovative food company engaged in "improper accounting practices and greenwashing," including in the registration statement filed with the SEC.[6]

- An environmental group filed a consumer fraud complaint against a prominent beverage company for allegedly representing itself as an environmentally friendly company, despite heavily contributing to the plastic pollution in the world.

We are likely to see a similar increase in government investigations and related government and private litigation involving climate and ESG issues in the FCA context, depending on the outcome of the FAR Council initiatives in response to EO 14030. Federal contractors should provide comments, and take steps to avoid becoming the target of FCA actions by implementing compliance measures to ensure they do not run afoul of the FAR. This includes any newly enacted amendments resulting from the FAR Council's Notice.

For further information or questions on FAR Council's proposed rulemaking, Presidential Executive Order 14030 and its implications, and other climate-related and other ESG issues, please contact **Jonathan D. Brightbill** (Partner, White Collar, Regulatory Defense & Investigations) or **Suzanne Jaffe Bloom** (Co-Chair, White Collar, Regulatory Defense & Investigations).

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[1] *Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions*, Federal Register (Oct. 15, 2021), https://www.federalregister.gov/documents/2021/10/15/2021-22266/federal-acquisition-regulation-minimizing-the-risk-of-climate-change-in-federal-acquisitions.

[2] *Id.*

[3] *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.

[4] *Id.*

[5] Jonathan Brightbill and Jennifer Porter, *SEC Demanding Expanded Climate and ESG Disclosures*, Winston's Environmental Law Update (Sept. 28, 2021), https://www.winston.com/en/winston-and-the-legal-environment/sec-demanding-expanded-climate-and-esg-disclosures.html.

[6] *Bentley v. Oatly Group AB*, No. 1:21-cv-06485 (S.D.N.Y., filed July 30, 2021); *Jochims v. Oatly Group AB*, No. 1:21-cv-06360 (S.D.N.Y., filed July 26, 2021).

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