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Connecting Climate Change and the Law

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President Biden Signs New Environmental Justice Executive Order

May 30, 2023

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On April 21, 2023, President Biden announced new initiatives to further his administration's commitment to addressing the impact of climate change on communities "with environmental justice concerns," including low-income communities and communities of color. The **new executive order**, "Revitalizing Our Nation's Commitment to Environmental Justice for All," creates a new White House Office of Environmental Justice, led by the Federal Chief Environmental Justice Officer, which is charged with "coordinating the implementation of environmental justice policy across the federal government." The Order expands the White House Environmental Justice Interagency Council, created by previous executive order, by adding numerous additional members, including a majority of the Cabinet or Cabinet-level officials.

The Order continues the administration's emphasis on its "whole-of-government commitment" approach to environmental justice, requiring federal agencies to consider and report on measures to ameliorate and prevent disproportionate negative environmental and health impacts on historically marginalized communities. It requires agencies to notify communities if a toxic substance is released from a nearby federal facility and hold public meetings to share information about potential health risks and precautions, thereby enabling them to participate in the decision-making processes that may affect their environment.

The order additionally establishes an Environmental Justice Subcommittee within the National Science and Technology Council, led by the Office of Science and Technology Policy, tasked with identifying and filling environmental justice data and research gaps.

The administration's focus on environmental justice issues is not new. In fact, it has formed part of the Biden administration agenda since its first weeks, and this most recent executive order builds on Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad," signed in his first few weeks in office. Executive Order 14008 launched an extensive environmental justice agenda that included establishing the White House Environmental Justice Interagency Council and the White House Environmental Justice Advisory Council; launching the Justice40 Initiative, aimed at allocating 40% of the overall benefits of federal investments relating to climate change to economically and environmentally disadvantaged communities; and launching the related Climate and Economic Justice Screening Tool and the Environmental Justice Scorecard.

Coinciding with President Biden's executive order, Vice President Harris visited Miami in late April to announce a $562 million investment in helping communities become more resilient to climate change. The investment would help 149 coastal communities in 30 states prepare for increased flooding as sea levels rise and storms intensify, according to the Commerce Department.

Taking the Temperature: In response to the White House announcement, Republican officials have suggested, among other criticisms, that the Order is a tactic to divert attention away from more pressing issues, including negotiations around raising the federal debt limit to avoid a federal government default. In his debt ceiling proposal, House Speaker Kevin McCarthy offered a debt ceiling increase in exchange for policy changes that included repealing billions of dollars in tax incentives for electric vehicles and the development of clean energy and other green technologies—major components of the Inflation Reduction Act (IRA) enacted last year—and expanding fossil fuel production.

Political jockeying notwithstanding, as our previous coverage illustrates, environmental justice issues permeate both regional and global policy discussions addressing climate change, decarbonization and the development of clean energy and green technology.

At the same time that he addressed American environmental justice concerns, President Biden also recognized these issues on a global scale at a virtual meeting of the Major Economies Forum (MEF) on energy and climate. The President unveiled a new plan for supporting developing nations in taking climate change action, including pledging $1 billion to the UN Green Climate fund, which finances clean energy and climate resilience projects in developing countries.

IAASB Public Consultation on Proposed Sustainability Assurance Standard to Begin in July

May 30, 2023

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In April, the International Auditing and Assurance Standards Board (IAASB) **announced** that the public consultation period for its proposed new sustainability assurance standard will begin in late July or early August 2023 rather than October 2023. This will allow for an extended period of consultation continuing to the end of December 2023.

Subject to the expected IAASB approval of the Exposure Draft in June, the extended consultation will allow early input into the development of the standard and help ensure the completion and publication of the final standard in 2024.

The proposed “International Standard on Sustainability Assurance (ISSA) 5000, General Requirements for Sustainability Assurance Engagements,” is intended as an overarching standard for assurance on sustainability-related reporting, which builds on the IAASB’s existing standards, including, for example, ISAE (International Standard on Assurance Engagements) 3000 (Revised) and ISAE 3410. ISSA 5000 will be principles-based and is intended for wide application “as a stand-alone, overarching standard suitable for both limited and reasonable assurance of sustainability information reported across any sustainability topics.” It will apply to sustainability information prepared under multiple reporting frameworks for a range of stakeholders. Given the broad application of the standard, it is also intended to be “profession-agnostic, supporting its use by both professional accountant and non-professional accountant assurance practitioners in performing sustainability assurance engagements.”

In developing the standard, the IAASB focused on **six priority areas**: 1) difference in work effort between limited and reasonable assurance; 2) suitability of reporting criteria; 3) scope of the engagement; 4) obtaining and evaluating evidence; 5) the entity’s system of internal control; and 6) materiality.

During the extended public consultation process, IAASB will coordinate closely with the International Ethics Standards Board for Accountants (IESBA) as IESBA advances its own project to develop ethics and independence standards for sustainability reporting and assurance. The coordination aims to ensure that the IAASB and IESBA’s efforts provide an integrated package of ethics and assurance standards for sustainability by the end of 2024.

The IAASB will also actively monitor, engage, and coordinate with other standard setters and organizations developing standards and guidance on sustainability reporting and assurance.

"The IAASB has prioritized the development of a high-quality, global sustainability assurance standard. In our recent outreach, stakeholders told us they are awaiting our proposals and urged us not to delay getting them into the market to benefit fully from diverse stakeholder opinion," said IAASB Chair Tom Seidenstein. "What will be critical now, as already encouraged by IOSCO, is for issuers, investors and other users, assurance providers, national standard setters, and others across the ecosystem to plan resources so that they can provide us their views during the consultation process. This is essential to ensure a final standard that is robust and drives high-quality assurance engagements, while meeting the needs of users and being profession-agnostic."

Taking the Temperature: As we noted earlier this year, one of IAASB's objectives set out in its 2024-2027 work plan is to establish globally accepted standards for assurance on sustainability reporting. In December, IESBA moved forward with two new standard-setting initiatives that will create broad ethics and independence standards for sustainability reporting as well as standards regarding the related topic of "use of experts" by organizations.

ISSA 5000 and IESBA's standards are part of the growing web of sustainability assurance standards and verification processes being developed against a backdrop of sustainability-related regulatory changes, complex sustainability-related disclosure requirements, increased demand from stakeholders and concerns over greenwashing. We have frequently commented on similar recent developments, including here and here.

While the regulatory landscape is inconsistent with respect to mandatory and voluntary assurance, the need for high-quality assurance of sustainability-related information, ESG-integration and sustainability-related metrics is clear. The International Organization of Securities Commissions (IOSCO) cited the importance of the standards being developed by both the IAASB and IESBA in a March 28 statement announcing its report on International Work to Develop a Global Assurance Framework for Sustainability-related Corporate Reporting.

As the standard setters work with the market to develop assurance standards for sustainability reporting and information, it is likely that issues relating to harmonization and alignment of standards will need to be addressed. These will need to take into account the varied approach to assurance across jurisdictions and regions but also in the context of sustainable products and investments.

European Council Adopts Position on Amendments to EU's Green Transition Consumer Rules

May 30, 2023

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On May 3, 2023, the European Council **adopted its position** and commented on a March 22, 2023 proposal to amend EU consumer rules targeting greenwashing. The proposal was **submitted by the European Commission** in March 2022 as one of the initiatives in its **New Consumer Agenda** and **Circular Economy Action Plan**.

As we **previously reported**, the proposal would amend the Unfair Commercial Practices Directive (UCPD) and the Consumer Rights Directive (CRD) to, among other things, reinforce consumer rights against alleged greenwashing. In commenting on the proposal, the Council supports a total ban on generic and vague environmental claims such as "eco-friendly," "green" or "climate neutral," including for the purposes of advertising, unless the claims can be substantiated by a publicly accessible certification scheme. To buttress the ability of consumers to compare products, only sustainability labels that are based on official certification schemes or otherwise registered as certification marks or established by public authorities would be allowed to be used going forward. The Council added to the proposal by suggesting that the "monitoring of compliance for such schemes should be objective, based on international, Union or national standards and procedures and carried out by a party independent from both the scheme owner and the trader. The independent third party should play an important role in ensuring compliance with the certification scheme and is expected to sufficiently fulfill requirements and to have sufficient procedures in place to ensure its own competence and independence."

The Council's comments on the proposal also address companies' statements about future environmental progress such as "in the form of a transition to carbon or climate neutrality, or a similar objective, by a certain date." According to the Council, through "such claims, traders create the impression that consumers contribute to a low-carbon economy by purchasing their products." Accordingly, the Council proposes that, to "ensure the fairness and credibility of such claims, Article 6(2) of Directive 2005/29/EC should be amended to prohibit such claims, following a case-by-case assessment, when they are not supported by clear, objective, publicly accessible and verifiable commitments and targets given by the trader and are not based on a realistic implementation plan that shows how these commitments and targets will be achieved. Such claims should also be verified by a third party expert, who should be independent from the trader, free from any conflicts of interest, with experience and competence in environmental aspects and who should be enabled supported by an independent monitoring system to monitor the progress of the trader with regard to the commitments and target.” The third-party findings should be made available to consumers.

The European Parliament will now take up the proposal. If the proposal is approved, it will then be transposed into the EU Member States' national legislation and consumers will be entitled to remedies in the event of breaches, including through the collective redress procedure under the Representative Actions Directive. This means there will be a potential for qualified entities to bring representative litigation before the national courts on behalf of consumers.

The Council also adopted a position to extend the transposition period from 18 to 24 months to allow EU Member States sufficient time to adopt the changes into national legislation.

Taking the Temperature: By proposing to amend its consumer protection laws, the Council is targeting as greenwashing the use of unsubstantiated sustainability-related terms, which is a key focus for regulators and standard setters alike. The EC recently proposed the Green Claims Directive, which attempts to implement measures designed to provide “reliable, comparable and verifiable information” to consumers, with the overall high-level goal to create a level playing field in the EU; earlier this year the European Securities and Markets Authority announced the launch of a common supervisory action (CSA), to continue throughout 2023, in partnership with EU Member State national competent authorities. The CSA will cover the application of MiFID II (Markets in Financial Instruments Directive) disclosure rules to marketing communications for financial products across the EU; and the UK Financial Conduct Authority is expected later this year to introduce a Policy Statement addressing greenwashing in response to the Sustainable Disclosure Requirements and investment labels consultation. Also notable is the Council’s focus on climate-related projections, which, as we have reported, at least with respect to net-zero plans and targets, increasingly have come under scrutiny.

Certain studies suggest that claiming to be “green,” “sustainable” and “climate neutral” (among the range of terms used) can provide a business with a competitive advantage across relevant products. As we reported, a recent study on greenwashing in the food sector shows that 42% of UK consumers are more likely to buy products with “carbon neutral” labels and 29% “willing to pay slightly or much more” for products so labeled. We can expect that enforcement targeting inaccurate “green” claims will increase using existing legal remedies and, potentially, the new avenues for redress introduced by the proposed EU consumer rules. We will continue to closely monitor this as part of a broader trend where regulatory and enforcement authorities, as well as activist stakeholders and NGOs, are driving a rise in environmentally-linked investigations and litigation.

Study Assesses Cost of Climate Litigation on Shareholder Value

May 30, 2023

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A **working paper** from the London School of Economics and Political Science that looked at over 100 climate-related lawsuits between 2005 and 2021 found that the filing of a climate-based litigation claim or corresponding unfavorable court decision reduced the market capitalization of the defendant company by about 0.41%, on average.

Broken out by incident, the study found that the mere filing of a climate-related lawsuit could decrease a company's market valuation by 0.35%, while an actual court decision finding liability on the company reduced the defendant company's market capitalization by 0.99%.

According to the working paper, the losses were not evenly distributed across all companies and sectors. The paper found a key distinction between "Carbon Majors" (*i.e.*, companies in the energy, utilities, and materials sectors of the economy) and non-Carbon Majors. For **Carbon Majors**, the filing of a case reduced market capitalization by 0.57% while an unfavorable court ruling impacted share price by 1.50%. But for non-Carbon Majors, the study found no statistically measurable impact on share price resulting from either initiation of a climate-related lawsuit or from an unfavorable decision.

Notably, the authors found that the vast majority of statistically measurable declines in share price occurred from litigation initiated after 2019. While the first recorded climate-related litigation dates back decades earlier, the study found that only in recent years have the capital markets responded significantly to climate-related lawsuits. The authors noted that by the mid-late 2000s, plaintiffs first began to develop novel climate-based litigation theories against large carbon emitters. In 2005, residents along the Mississippi Gulf Coast impacted by Hurricane Katrina sued an oil and gas company for damages. Three years later, in 2008, residents in Alaska sued an oil and gas company seeking damages related to expected relocation costs on grounds that rising sea levels threatening their homes were caused by carbon emissions. Plaintiffs lost both cases and the study notes that climate litigation against large corporations quieted in response. But that gradually changed as governments globally increasingly took action to address climate issues, academic studies demonstrated stronger ties between carbon emissions and climate change and international consensus formed around the goals of the Paris Agreement. Since 2019, an unfavorable decision to a Carbon Major has resulted in a 1.55% decline in market capitalization.

While the percentage impact on share price seems small, the authors noted that an unfavorable decision to a company leads to a $360 million loss in shareholder value, on average. The paper acknowledged that these are averages and may be skewed by large cases. But even so, the dollar amounts may not even fully measure the impact of climate-related litigation on a company, or similarly situated companies, for a number of reasons. First, there is a small but statistically measurable anticipation effect in advance of a judicial decision. Accordingly, the resulting decline in share price after a decision is released may not fully account for the anticipatory impact on share price before judgment is rendered. Second, the long timeline of a litigation means that a company can slowly lose shareholder value from pre-judgment motion practice, news reports and preliminary decisions. Finally, cases brought against one company within an industry may impact others in the industry as well.

Taking the Temperature: In one sense, it is not surprising that the filing of a lawsuit or an adverse decision can negatively impact a company's stock price, depending on the significance of the litigation and market perceptions about the likelihood and magnitude of a potential pro-plaintiff judgment. More notable is that, according to the study, meaningful share price impact is a relatively recent phenomenon, coinciding, as the authors observe, with increasing general awareness of and legislative and regulatory activity around climate-related issues. Litigation is no exception. We comment frequently on the accelerating trend of climate-related litigation globally, as well as shareholder pressure on companies related to climate challenges. Directors and officers confronting this environment, as well as the "pro-ESG" and "anti-ESG" divide in the U.S., can best address these challenges by focusing on climate-related governance (*i.e.*, monitoring and assessing material risks and opportunities), data collection/assessment (including alignment with SBTi or other data standard setters) and disclosure (including necessary caveats or qualifications on articulated climate goals). Doing so can help reduce litigation exposure and, in that, preserve shareholder value. And, according to at least one recent study, "ESG activities have no strong negative correlations with financial outcomes; in fact, they are associated with encouraging revenue growth and EBITDA margins."