HINSHAW

Alerts

Comments Due to the Federal Insurance Office on its Wide-Ranging Work Relating to the Insurance Sector and Climate-Related Financial Risks

October 12, 2021
Insights for Insurers

President Biden's May 20, 2021 Executive Order on Tackling the Climate Crisis at Home and Abroad set forth the Administration's policy to "organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach." Exec. Order No. 14,030 § 3(b)(i), 86 FR 27967 (May 20, 2021). The Executive Order followed President Biden's January 27, 2021 Executive Order that placed the climate crisis at the core of U.S. foreign policy and national security and seeks to "put the United States on a path to achieve net-zero emissions, economy-wide, by no later than 2050." Exec. Order No. 14,008 § 201, 86 FR 7619 (January 27, 2021).

All arms of the federal government are currently engaged on ESG (environmental, social, and governance) considerations. Many commentators have expressed concern that the federal government is exploiting ESG to interpose wide-ranging federal regulation on many market sectors and to displace state regulatory powers. Certainly, the insurance industry is receiving considerable scrutiny and many aspects of the business of insurance appear to be targeted for federal oversight by various governmental agencies and regulatory authorities, including the Federal Insurance Office.

The Federal Insurance Office of the U.S. Department of the Treasury (FIO) issued a Request for Information (RFI), following the May 20, 2021 Executive Order on Climate-Related Financial Risk, that solicits "public input on FIO's future work relating to the insurance sector and climate-related financial risks." FIO expressed the intent for its climate-related work to respond to the Executive Orders and the Treasury Department's broader climate work, including working with Treasury's Climate Hub.

Stakeholder Comments to the FIO Due November 15

The initial purpose of this article is to remind interested parties about the opportunity to provide any comments on the RFI to the FIO. The importance of climate change and the scope of the activities envisioned by FIO suggest that insurers and reinsurers would be well-served by providing extensive and thoughtful commentary regarding the scope of FIO's work.

Attorneys

Scott M. Seaman

Service Areas

Sustainability & ESG

A review of the RFI, however, raises larger issues concerning whether the federal government is transitioning from limited involvement in regulation of the business of insurance – which has been the case traditionally in the U.S. under McCarran Ferguson Act which was passed by Congress in 1945 – to wide-ranging federal oversight that could greatly diminish or virtually supplant many aspects of state regulation of insurance. Indeed, one of the statements made in the RFI suggest the FIO may seek to subjugate state regulators and make them mere consultants or agents of the FIO.

It is worth reviewing the RFI to get a sense for how the federal government is using climate change as a lever for unprecedented federal regulation. Keep in mind that this RFI is only directly at FIO's "initial" work.

FIO indicated that it intends *initially* to focus on the following three climate-related priorities:

1. Insurance Supervision and Regulation: Assess climate-related issues or gaps in the supervision and regulation of insurers, including their potential impacts on U.S. financial stability.

According to the FIO, maintaining the financial stability of the insurance sector will involve identifying and filling gaps (if any) in insurance supervision with a focus on assessing climate-related financial risks. This will include monitoring the integration of climate-related financial risks into insurance supervisory practices and regulatory frameworks, as well as assessing whether sufficient data, methodologies, and tools exist to manage the solvency of insurers and to protect them against the long-term risk of climate change. FIO states it "will consult with individual state insurance regulators and the NAIC" during its assessment of such supervisory practices and resources. Generally speaking, state regulators have been fairly effective in ensuring the solvency of insurers facing a variety of risks including environmental liabilities for the past thirty years.

2. Insurance Markets and Mitigation/Resilience: Assess the potential for major disruptions of private insurance coverage in U.S. markets that are particularly vulnerable to climate change impacts; facilitate mitigation and resilience for disasters.

The FIO notes that:

> [g]rowing evidence indicates that climate change may be associated with a decline in the availability and affordability of insurance provided by the private sector (i.e., private insurance coverage) in certain markets. . . The creation and expansion of insurers of last resort by individual U.S. states and the federal government highlights this problem. . . FIO intends to examine the insurability of disasters that are produced or exacerbated by climate change, including wildfires, hurricanes, floods, wind damage, and extreme temperatures. Additionally, traditionally underserved communities and consumers, minorities, and low- and moderate-income persons may have disproportionate challenges in obtaining affordable property insurance to cover the risks posed by climate-related disasters; further declines in available and affordable insurance could exacerbate the inequities that these persons face. . . . This situation underscores the need to identify solutions to address the growing protection gap exacerbated by climate change. . . . Therefore, FIO also intends to assess the availability and affordability of insurance coverage in high-risk areas, particularly for traditionally underserved communities and consumers, minorities, and low- and moderate-income persons.

This appears to suggest that the FIO intends to be involved in regulating the types, terms, and pricing of a broad range of insurance products.

3. Insurance Sector Engagement: Increase FIO's engagement on climate-related issues; leverage the insurance sector's ability to help achieve climate-related goals.

FIO plans to increase its engagement on climate-related issues and take a leadership role in analyzing how the insurance sector may help mitigate climate-related risks. FIO appears ready to address the insurance sectors transition of its operational activities attributable to greenhouse gas (GHG) emissions. It also intends to look into the underwriting activities, investment holdings, and business operations to influence policyholders and markets to support or interpose a low emissions economy. In some respects, it may be that the FIO will seek to have insurers serve as private regulators (similar to private attorneys general).

Comments to the RFI are due by November 15 and may be submitted electronically through the Federal eRulemaking Portal at http://www.regulations.gov.