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Interim Update on Biden Administration Climate Change Initiatives

The last edition of the Climate Report discussed President Biden's signing, on his first day in office, of an instrument for the United States to re-join the Paris Agreement on controlling climate change and his issuance one week later of Executive Order 14008 on "Tackling the Climate Crisis." The Administration is moving to implement the measures promised by these actions, including:

Greenhouse Gas Reduction Target
President Biden formally committed the U.S. to achieving a 50% reduction in net greenhouse gas emissions by 2030. It will take substantial reductions in emissions by nearly every sector, especially power generation and transportation, to achieve this goal. In addition, the focus on "net" emissions is important because it suggests a significant role carbon capture and other offset efforts.

Vehicle Emissions
EPA is moving to reinstate the Clean Air Act waiver that previously allowed California to set its own standards for greenhouse gas emissions from vehicles. California had used this authority to increase mileage standards and require some zero emission vehicles before the Trump administration tried to revoke the waiver. Following the lead of some European cities, it would not be terribly surprising to see efforts at the state or federal level to ban internal combustion engines in new passenger vehicles beginning with model years in the latter half of the decade.

Greenhouse Gas Emissions from Power Plants
EPA is considering how to regulate power plant emissions in light of the thorny legal issues created by challenges to the Clean Power Plan and the Affordable Clean Energy rule that left no rule in place for existing plants. Those issues were magnified on April 29 when 19 states led by West Virginia petitioned the Supreme Court to review EPA's authority. Additional petitions are expected to be filed by industry and other states. These actions have led EPA to consider if other existing Clean Air Act authorities can be used to require greenhouse gas emission reductions at power plants. There is not a clear path to an effective rule that will survive judicial scrutiny at this point.

Oil and Gas Operations
A May 6, 2021, report by the United Nations Environment Programme suggests that reductions in methane emissions from oil and gas operations could be significant in addressing climate change. The Trump administration's repeal of methane emission standards for oil and gas operations is on life support as a result. On April 28, the Senate passed a Congressional Review Act resolution to rescind the repeal, and EPA is headed in that direction even if Congress does not act. Meanwhile, a variety of efforts to restrict emissions on federal lands are being pursued, from efforts to reduce or eliminate future leases and drilling permits to strict standards for emissions at wells that are authorized. For example, the Department of Interior revoked 12 orders issued during the Trump administration. This action has the effect of restoring the Obama administration's restrictions on fracking on federal lands along with a 2016 moratorium on coal mining.

Environmental Impacts and Social Cost of Carbon
Several agencies have repealed Trump Administration policies on the scope of environmental review for new project authorizations, with the result that greenhouse gas emission impacts of using oil and gas made available by new pipeline projects, for example, now have to be considered. When they are considered in a cost benefit analysis, the interagency working group established by the Executive Order determined that agencies should use the $51 per ton social cost of carbon that was in use at the end of the Obama Administration and promised further revisions to the figure. There is ongoing debate whether a price on carbon emissions (i.e., a carbon tax) is necessary to provide the market with the signals it needs to help generate the desired reductions. The social cost of carbon is viewed by some as a starting point for the discussion on where that price should be set.

SEC Enforcement Policy
The Securities and Exchange Commission announced that it is increasing the examination of funds that claim to use environmental, social and governance ("ESG") metrics in selecting investments to assure that those metrics are applied as advertised. In addition, the SEC appears to be considering more prescriptive approaches to achieving consistency and uniformity in ESG reporting metrics.

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FERC Announces Greenhouse Gas Emissions Will Be Considered in Review of Natural Gas Pipeline Certificates

On March 22, 2021, the U.S. Federal Energy Regulatory Commission ("FERC") issued an order authorizing Northern Natural Gas Company ("Northern") to abandon-in-place a segment of its natural gas pipeline running from Nebraska to South Dakota. *Northern Natural Gas Co.*, 174 FERC ¶ 61,189 (2021) (the "March 22 Order"). The March 22 Order also granted a certificate for Northern to construct and operate new pipeline in order to replace the capacity associated with its abandoned facilities. While the outcome of the March 22 Order is mostly inconsequential, the order contains a potentially significant change in how FERC will consider greenhouse gas ("GHG") emissions in its review of natural gas pipeline certificate applications going forward. Specifically, the March 22 Order explains that FERC will now "consider all appropriate evidence regarding the significance of a project's reasonably foreseeable GHG emissions and those emissions' contribution to climate change." This is a significant departure from FERC's previous restrained stance on considering GHG emissions, in which it held that it was unable to make that assessment. What this means for the natural gas industry is still unresolved, though interested parties may consider either commenting on a February 18, 2021 FERC Notice of Inquiry ("NOI") that covers the GHG issue, or intervening in open proceedings that may further clarify how FERC intends to consider GHGs in its review of natural gas pipeline certificate applications.

FERC's Previous Approach to Considering GHG Emissions
A certificate of public convenience and necessity ("CPCN"), issued by FERC, is required to construct and operate an interstate natural gas pipeline under Section 7 of the Natural Gas Act. As part of issuing a CPCN, and in furtherance of FERC's obligations under the National Environmental Policy Act ("NEPA"), FERC conducts an environmental analysis of proposed projects. In two recent decisions in the D.C. Circuit Court of Appeals, *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) and *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019), the court clarified how FERC must consider GHGs in issuing CPCNs under NEPA. In *Sierra Club*, the D.C. Circuit held that FERC must estimate the amount of power-plant carbon emissions that pipelines make possible when those indirect emissions are reasonably foreseeable, or explain why it could not make such an estimate. In *Birckhead*, the D.C. Circuit explained, in dicta, that a project's indirect GHG emissions are not just foreseeable when FERC knows the destination and end-use of the natural gas; instead, the decision to estimate indirect GHG emissions should be made on a case-by-case basis.

Despite the D.C. Circuit's directives in *Sierra Club* and *Birckhead*, FERC continued to be restrained in its consideration of GHG emissions throughout the remainder of the Trump Administration. For example, in *Tennessee Gas Pipeline Co.*, 169 FERC ¶ 61,230 (2019), FERC held on to its reasoning that GHG emissions should not be considered when the end-use of the natural gas was unknown. Moreover, in *El Paso Natural Gas. Co.*, 169 ¶ 61,133 (2019), FERC reasoned that generalized statements regarding the end use of gas delivered by a project are insufficient to warrant an analysis of GHG emissions.

FERC's New Approach to Considering GHG Emissions in the March 22 Order
Following the change of administration, Commissioner Richard Glick was named chairman of FERC by President Biden on January 21, 2021. Commissioner Glick had previously authored dissents in which he was critical of FERC's restrained approach to analyzing GHG emissions, and a policy shift in this area under Glick's leadership is therefore not surprising. On February 18, 2021, FERC issued an NOI seeking comments on whether it should formally refine its approach to its GHG analysis in FERC's Certificate Policy Statement, a guidance document the agency uses to evaluate certificate applications. In an unexpected move, however, FERC revised its approach to GHGs as set out in the March 22 Order while the comment period for the NOI was still pending. While the March 22 Order makes it clear that FERC will consider GHG emissions from natural gas pipeline projects, the specific contours of that analysis are still uncertain.

As detailed in the March 22 Order, FERC will now consider a project's GHG emissions "along with many other factors when determining whether a project is required by the public convenience or necessity." FERC views this analysis as part of its obligation under NEPA to take a "hard look" at a project's environmental impacts. With regard to GHG emissions, FERC explained that it will evaluate whether such emissions and their contribution to climate change may have significant environmental impacts. To determine the significance of GHG emissions, in the March 22 Order, FERC compared the project's reasonably foreseeable GHG emissions to the total GHG emissions of the U.S. as a whole, which allowed FERC to assess the project's relative contribution to GHG emissions and their potential impact on climate change at a national level. Ultimately, FERC concluded that Northern's proposed pipeline project could potentially increase GHG emissions by extremely small amounts, 0.0002% to 0.000006%, and that the project's contribution to climate change would not be significant.

In so holding, however, FERC indicated that NEPA does not prescribe reliance on specific metrics or models and that a wide range of evidence may be relevant to evaluate whether a project has significant environmental impacts. FERC was careful to note that "[i]n future proceedings, the evidence on which the Commission relies to assess significance may evolve." FERC also cited the February 18th NOI, suggesting that it may use that proceeding to further elaborate the details on its new GHG approach. For example, the Order does not mention use of the social cost of carbon in FERC's analysis, though President Biden has made implementation of a social cost of carbon a priority of his administration. *See* Executive Order On Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021).

In a lengthy partial dissent to the March 22 Order, Commissioner James Danly argued that FERC violated the Administrative Procedure Act ("APA") by reversing its "longstanding determination" that the agency is unable to assess GHGs. Specifically, Commissioner Danly argued that FERC's action in the March 22 Order was arbitrary and capricious under the APA because FERC (i) failed to explain its departure from precedent, (ii) created a test with no standards, (iii) failed to engage in reasoned decision making by acting before the questions posed in the pending NOI are answered, and (iv) acted outside the scope of its expertise. Danly ended his dissent with a warning where he pleaded for interested parties to intervene in open proceedings as a way to prevent the "profound consequences" of the March 22 Order. Commissioner Mark Christie also authored a partial dissent in which he reasoned that it is "unfair and premature at best to jump the gun" by deciding the GHG issue in the March 22 Order rather than through the pending NOI process.

Potential Impact of the March 22 Order on the Natural Gas Industry
FERC's March 22 Order represents a significant policy change and should put the industry on notice that FERC will evaluate GHG emissions and their potential impact on climate change as part of FERC's review of the environmental impact of a pipeline project and its determination of whether the project is required by the public convenience and necessity. How FERC will do this, however, is less clear. A more precise assessment of this new policy is difficult because the March 22 Order leaves open questions about how specifically FERC plans to address GHG emissions in certificate proceedings, and because the impact of Northern's GHG emissions was so small that FERC did not have reason to evaluate GHG emissions and the contribution to climate change as a component of its more comprehensive review of a project under NEPA. Further, given the facts and circumstances of this specific proceeding, it appears unlikely that the March 22 Order will be subject to further review. The other principal uncertainty is whether FERC will articulate a more consistent policy in its forthcoming order on the NOI, or whether it will continue to decide matters on a case-by-case basis. The risks to the industry of case-by-case adjudications was highlighted in Commissioner Danly's dissent, where he argued that "*every single* natural gas company, LNG company, and shipper should intervene in *every single* certificate item" to protect their interests.

Finally, the March 22 Order focuses even more attention on the pending NOI, where these issues will be front and center. Interested parties can submit comments on the February 18th NOI (FERC Docket No. PL18-1-000) at any time up to May 26, 2021.

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New Zealand Government Introduces World-First Climate-Reporting Disclosure Laws

On April 12, 2021, the New Zealand government introduced an omnibus bill into parliament, aiming to introduce mandatory requirements for businesses in the financial sector to disclose the impacts of climate change on themselves and develop strategies to manage climate change risks and opportunities. The Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 ("Climate Bill") is touted by the New Zealand government as a "world first" piece of legislation.

In a speech at the first reading of the Climate Bill, New Zealand Minister of Commerce and Consumer Affairs, David Clark, noted how in December 2020, the New Zealand government declared a climate emergency, committing the nation to urgent action on reducing emissions. He said:

> The main aim is to move to a position where the effects of climate change become routinely considered as a part of business investment decisions. It'll contribute towards that goal we've set of becoming carbon-neutral by 2050. Effectively, it does this by requiring around 200 of the largest and most important businesses participating in the New Zealand financial markets to disclose clear, comparable, and consistent information about the risks and opportunities presented by climate change….

The Climate Bill achieves this change by amending the *Financial Markets Conduct Act 2013*, the *Financial Reporting Act 2013* and the *Public Audit Act 2001*—seeking to ensure that the effects of climate change are routinely considered in business, investment, lending and insurance underwriting decisions. The disclosures will be made in accordance with standards issued by New Zealand's External Report Board (XRB), which will also have the ability to issue guidance on a wide range of environmental, social and governance matters that can be applied by businesses on a voluntary basis. The entities in New Zealand that are required to make disclosures under the Climate Bill are:

- All registered banks, credit unions and building societies with NZD 1 billion or more in assets;
- All managers of registered investment schemes and crown financial institutions with NZD 1 billion or more in assets under management;
- All licensed insurers with greater than NZD 1 billion in assets under management or annual income more than NZD 250 million; and
- All companies listed on the New Zealand Stock Exchange (NZX).

Disclosures would be made on a "comply-or-explain" basis in each businesses' public annual financial filings, meaning that where there is insufficient information to allow a disclosure, reporting organizations can explain rather than disclose. Disclosure on greenhouse gas emissions will need to be independently audited, and the disclosures must meet the standards set by the XRB—meaning that the precise content of disclosures is not yet known.

It remains to be seen whether the climate-related disclosures required by the Climate Bill will have a meaningful impact on the behavior of businesses within New Zealand, and whether more businesses will sign up to the voluntary scheme for reporting. The Climate Bill is currently being considered by a select committee of the New Zealand government, which will publish a report on the bill in August 2021—the bill will likely be passed after this report. If passed, the Climate Bill will represent a significant development in the law, and may act as a guide for things to come in other jurisdictions around the world.

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Mexican Electric Industry Reform: A Setback to Climate Change Policies?

Precedents and Goals on Climate Change

In accordance with Mexican legal precedents, climate change is the "[v]ariation of the climate directly or indirectly attributed to human activity, which alters the composition of the global atmosphere and adds to the natural variability of the climate observed during comparable periods."

In response to climate change, Mexico has implemented and adopted several mitigation and adaptation policies under the precaution, sustainability, co-responsibility and progressivity principles established in the Mexican Constitution, international treaties and environmental and energy federal laws. With respect to the energy sector, these policies have been further developed with the publication of the National Program for the Sustainable Use of Energy, the Program for the Development of the National Electricity System 2019-2033 and the Transition Strategy to Promote the Use of Cleaner Technologies and Fuels.

Under such provisions and guidelines, Mexico has set specific goals to combat climate change, including in accordance with the Second Transitory Article of the General Law on Climate Change: (i) reduction of 22% of greenhouse gas ("GHG") emissions by 2030 through the reduction of emissions from transportation by 18%, electricity generation by 31%, residential and commercial by 18%, oil and gas by 14%, industry by 5%, agriculture and livestock by 8%, and waste by 8%; (ii) reduction of emissions intensity per unit of gross domestic product by 40% between 2013 and 2030; and (iii) reaching a maximum of national emissions by 2026. Furthermore, by signing and ratifying the Paris Agreement, the Mexican State ratified its commitment to this 22% reduction of GHG emissions and 51% of black carbon, as well as to generate 35% of power through clean energy sources by 2024 and 43% by 2030.

Notwithstanding the above, currently, the generation of electricity represents 24.1% of all GHG emissions in Mexico. Of this percentage, coal-fired power contributes 4.7%; combined cycle 3.6%; conventional thermal 3.8%; natural gas 5.6%; petroleum refining 1.7%; and solid fuels manufacturing and other energy industries 4.1%. In this regard, it is estimated that these sources generate 1.82 tons per year of carbon dioxide ("CO_2") emissions per ton of coal used, 3.12 tons per year of CO_2 emissions per ton of heavy fuel oil, 2.83 tons per year of CO_2 emissions per 1 ton of diesel; while emissions are reduced by up to 30% (depending on the source) when using clean energy sources or under the energy efficiency and pollutant emissions reduction scheme.

On March 6, 2021, the National Meteorological Service reported that the temperature in Mexico has increased 1.4 degrees Celsius, with respect to the reference period 1981-2010, and in that same period, the planet increased 0.98 degrees Celsius, meaning the temperature in Mexico increased faster than in the rest of the world.

Electric Industry Reform

Regardless of the above-mentioned rules, polices, programs, and international commitments, on March 9, 2021, the Congress passed a presidential bill that reforms and adds certain provisions to the Electricity Industry Law (the "Reform"), with the objective of strengthening the Federal Electricity Commission ("CFE"), which is the state owned company that for many years had a monopoly on electric energy generation, until President Peña Nieto's 2013 reform opened the activity to the private sector.

While the new administration's objective could be considered politically legitimate and foreseeable, its implementation is questionable from a legal point of view and poses a threat to Mexico's goals to combat climate change, as CFE's power generation is mostly done through conventional sources, and the Reform establishes a new structure that would result in the elimination of the preference for clean energy generation and other incentives granted to aid in the growth and development of the clean energy sector. Neither the President nor the Congress proposed complementary or compensatory measures that could mitigate the negative effects of the Reform.

In reaction, more than 120 companies, non-governmental organizations and even governmental decentralized bodies around the country, have filed "Amparo" law suits against the Reform before federal courts (a Constitutional control judicial process to protect individuals' human rights against general rules, acts or omissions by public authorities). Courts in many of these cases have granted injunctive relief, suspending the Reform until such processes are resolved. These suits argue that the Reform goes against several constitutional principles and rights, such as the human right of every person to a healthy environment and sustainable development, as well as commitments on GHG reduction and the transition to clean energy agreed to by Mexico in the international arena, including the Paris Agreement, the Agreement on Environmental Cooperation between the Governments of Mexico, the United States of America and Canada, and the 2030 Agenda for Sustainable Development, among others, which require adopting measures to reduce polluting energy and encourage the use of energy from renewable sources.

The suits further argue that the Reform contradicts provisions contained in various environmental and energy federal laws, including, the General Law on Ecological Balance and Environmental Protection, the General Law on Climate Change, the Electric Industry Law and the Energy Transition Law, among others, which establish provisions aimed at prioritizing and transitioning to clean energies. Therefore, the issuance of the Reform has created a conflict that will have to be finally resolved by the competent courts.

If the Reform is ultimately implemented, the benefits granted to the CFE will be a true disincentive for the development of clean energy plants in Mexico, and will be a setback to Mexico's climate change policies, which were achieved after a long-standing demand and work done by a multiplicity of interested sectors.

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Temporary Ban on New Federal Oil and Gas Leases Under Fire

First Quarter of Biden Presidency Impactful for Energy Industry

On January 27, 2021, President Biden signed Executive Order 14008 ("E.O. 14008"), implementing a temporary pause on the auction of new oil and gas leases on federal land and water while the President's administration reviews the program. The review will consider potential climate and other impacts of current federal oil and gas permitting/leasing practices and whether to take action to account for corresponding climate costs. E.O. 14008 will not affect existing leases or drilling permits for valid, existing leases. In addition, E.O. 14008 will not restrict energy activities on private or state lands.

The Bureau of Land Management ("BLM") and the Bureau of Ocean Energy Management ("BOEM") promptly took action to implement E.O. 14008. On February 4, 2021, BOEM cancelled a public comment period for the Draft Environmental Impact Statement being prepared for the proposed lease sale of acreage in Cook Inlet, Alaska ("Proposed Lease Sale 258"). On February 18, 2021, BOEM rescinded the planned lease sale of acreage within the Gulf of Mexico ("Lease Sale 257"), which was scheduled to take place on March 17, 2021.

In addition, BLM issued several notices during January, February, and March, postponing first quarter lease sales previously scheduled to be held during March and April for federal lands located in Colorado, North Dakota, Montana, Nevada, New Mexico, Oklahoma, South Dakota, and Utah, as well as states located east of the Mississippi River. BLM also issued notice during April that no second quarter lease sale will be held for certain states (collectively, "Postponed Sales").

States Challenge Postponed Sales

On March 24, 2021, Alabama, Alaska, Arkansas, Louisiana, Georgia, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Texas, Utah, and West Virginia (collectively, the "Plaintiff States"), filed suit in the Western District of Louisiana against President Biden and various officials within the Department of the Interior ("DOI"), challenging the Postponed Sales. The Plaintiff States allege that E.O. 14008 and the Postponed Sales contravene the statutory mandates of the Outer Continental Shelf Lands Act ("OCSLA") and the Mineral Leasing Act ("MLA"). They allege that, under OCSLA, the DOI Secretary must conduct lease sales in accordance with the five-year leasing program in effect at the time. The Plaintiff States further allege that, under the MLA, the DOI Secretary must auction federal oil and gas leases at least quarterly in each state where eligible lands are available. They seek declaratory and injunctive relief, stating that the Postponed Sales were delayed without sufficient rationale because E.O. 14008 did not provide any basis to deviate from the statutory mandates of OCSLA or the MLA. Accordingly, Plaintiff States allege that the Postponed Sales are arbitrary and capricious under the Administrative Procedure Act ("APA") and must be vacated.

On April 27, 2021, several environmental groups filed a joint motion to intervene and, on the same day, the Biden Administration filed a motion to transfer the case to the District of Wyoming, where a similar suit was filed by the State of Wyoming less than one hour before the Plaintiff States' lawsuit in Louisiana and asserts similar claims. The Plaintiff States opposed both motions on May 4, 2021.

This is not the first time a federal moratorium on oil and gas activities has been challenged under the APA. For example, after the Obama Administration implemented a six-month moratorium on offshore drilling operations after the Deepwater Horizon incident, several companies filed suit in the Eastern District of Louisiana and obtained an injunction under the APA. While the case was never resolved due to the Obama Administration lifting the moratorium, it demonstrates that litigants can achieve at least limited success using the APA to challenge government action in this area. But litigants also face difficulties pursuing relief under the APA, including limited or no discovery, judicial deference to agency action, and establishing final agency action that is properly subject to review. As the Biden Administration digs in and prepares its initial responses to the lawsuits, the energy industry will be closely watching these cases.

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European Courts Face a Rising Tide of Climate Litigation

European courts, both at the Union level and the Member State level, are continuously facing a rising tide of climate litigation cases, with different responses.

At the European Union ("EU") level, on March 25, 2021 the Court of Justice of the European Union ("CJEU") dismissed the so-called "People's Climate case," a legal action brought in 2018 by 10 families from European and non-European countries who sought the annulment of the 2018 European legislative package and an order from the court to the EU institutions to set more stringent targets for the reduction of greenhouse gas emissions. The CJEU confirmed on appeal the decision of the General Court of the European Union of May 8, 2018, ruling inadmissible the claim, as the claimants were not directly and individually concerned by the legislation they sought to have annulled.

However, in Germany, in a similar case brought by individual claimants and non-governmental organizations ("NGOs") against the Federal Climate Change Act of 12 December 2019, the German Federal Constitutional Court reached a different conclusion in an order announced on April 29, 2021. As discussed in a recent Jones Day Alert, the court agreed with the claimants that the Act governing national climate targets and the annual emission amounts allowed until 2030 are not compatible with fundamental rights. According to the court, the legislator did not take the precautionary steps to mitigate the impact on the freedom guaranteed by fundamental rights of the future obligations to reduce emissions and adopted provisions that are not sufficient to ensure that the necessary transition to climate neutrality is achieved in time. Interestingly, the court highlighted that the fundamental right to property also imposes a duty of protection on the state with regard to the property risks caused by climate change.

Finally, in France, courts are increasingly receiving climate change related lawsuits against companies for the alleged non-compliance with their "duty of vigilance." The so called duty of vigilance is based on the 2017 French law which requires large companies operating in France to draw and make publicly available internal care plans applying to their worldwide operations and to their suppliers and subcontractors, in order to mitigate breaches of corporate social responsibility rules, including in their supply chain. For example, a group representing indigenous people living in the Amazon Forest and NGOs from France and the U.S. filed a lawsuit against a French grocery store chain in March 2021. Claimants argue that the company's supply chains in Latin America would result in deforestation and the loss of land in Brazil and Columbia, in violation of its duty of vigilance.

These cases illustrate the variety of climate change lawsuits that European courts have to increasingly deal with and the ever-growing array of legal venues explored by claimants to challenge EU institutions, EU Members States, and companies alike.

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Climate Change Transactional Issues & Updates

Biden Infrastructure Plans Could Spur Clean Energy Deals

On March 31, 2021, President Biden proposed the American Jobs Plan ("Biden's Plan I"), a $2.3 trillion infrastructure plan to invest in roads, transportation, water, broadband, and clean energy. In response, on April 22, 2021, Republican lawmakers unveiled a $568 billion roadmap ("the Republican Plan") that focuses on traditional infrastructure exclusively. Most recently, on April 28, 2021, President Biden announced the $1.8 trillion American Families Plan ("Biden's Plan II"), which does not focus on tangible infrastructure but contains proposed tax increases to pay for both Biden's Plan I and Biden's Plan II (together, the "Plans"). The investment contemplated in the Plans is frequently cited for its potential to increase M&A activity in the clean energy sector, particularly given President Biden's focus on clean energy as a central piece of his climate change goals. Even before enactment, the prospect of the Plans themselves may already be having an impact.

While the Republican Plan concentrates only on traditional infrastructure, Biden's Plan I targets sectors within which investment is likely to have an environmental impact. For example, Biden's Plan I will invest an additional $165 billion into rails and mass transit while the Republican Plan cuts the current budget for the same by $3 billion. Additionally, Biden's Plan I includes $100 billion to upgrade electric grids, $300 billion to boost manufacturing and supply chain capacity, $16 billion to clean up oil and gas wells and mines, $174 billion to invest in electric vehicles and related infrastructure, $46 billion in procuring clean energy manufacturing, and investment in carbon capture to help decarbonize power plants, cement and steel manufacturing.

However, the potential for Biden's Plan I's heavy investment in clean energy may not be the only relevant driver of M&A transactions in the clean energy space this year. Rather, uncertainty around how the Plans will be funded, the types of tax hikes involved, as well as the Plans' effects on oil prices might impact M&A activity. To pay for Biden's Plan I, President Biden is proposing increasing the corporate tax rate to 28% and eliminating $35 billion worth of fossil fuel tax subsidies. Biden's Plan II would be funded by tax increases, including taxing capital gains as ordinary income for high-income earners. These potential tax increases are likely playing a significant role in contributing to the recent surge in M&A deal activity in the clean energy space.

Additionally, these Plans come at the same time as a historical change in financing for renewable projects. In the past, a large portion of the economics of renewable deals was in the form of federal tax credits (both production tax credits for a 10-year period and investment tax credits at the time the property is placed in service). Monetizing those credits required attracting tax equity investors, which involved complex structures and limitations on developers. These tax credits, however, are scheduled to phase out and the Plans do not propose to extend these tax credits or interrupt their phase-outs. Instead, as noted above, they focus on infrastructure to support renewables projects. Ironically, the tax increases in the Plans may increase the demand for the reduced tax credits and the accelerated depreciation (which has more value if investors face a higher tax rate). The impact on developers and financing makes the current market even more ripe for M&A.

Whether the Plans will pass in their current forms hinges on ongoing negotiations in Congress. In any case, speculations about the enactment of the Plans and their attendant tax consequences could likewise stimulate a surge

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