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# New California Law Establishes Significant Disclosure Requirements Related to Climate Goals, Claims and Offsets Beginning January 1, 2024

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On October 7, 2023, California Gov. Gavin Newsom signed the Voluntary Carbon Market Disclosures Act (VCMDA) – AB 1305 – which will impose new requirements applicable to companies making climate-related claims, as well as participants in carbon emission offset markets. In addition to new obligations for companies that purchase and sell offsets within California, the VCMDA includes **significant broadly applicable disclosure obligations for companies that operate in California and make claims regarding the climate performance or goals of their business or individual products**. These new rules supplement new greenhouse gas (GHG) emissions and climate risk disclosure requirements (the California Climate Accountability Package, or CCAP) contained in SB 253 and SB 261, which Newsom also signed on October 7.

The VCMDA applies to public and private companies, regardless of company size, that undertake specified activities within the state. The most impactful elements of the VCMDA are new annual website disclosure obligations covering any company that operates in California that makes certain climate-related claims or goals, including the very large number of companies that have set net zero targets or make claims regarding the climate performance of their business or individual products. In addition to the many large public companies that have made net zero commitments, the VCMDA will potentially apply to companies that include certain climate-related claims in their product marketing – ranging from consumer goods or ecommerce companies that tout offset purchases and low-emissions products to renewable energy and other climate tech businesses.

Disclosure under the VCMDA must be published on company websites and updated at least annually. These requirements take effect on January 1, 2024, requiring covered companies to act quickly to prepare relevant disclosure.

## Disclosure obligations for companies making climate performance claims or setting emissions goals

Separate from the new rules applicable to the purchase and sale of offsets, Section 44475.2 of the VCMDA creates disclosure obligations for entities that (1) operate within California and (2) make claims within California:

- Regarding the achievement of net zero emissions;
- That the entity, its affiliates or **a product** is carbon neutral, or that imply that such entities or products do not add net GHG emissions; or
- That such entities or products have made **"significant reductions"** to their GHG emissions.

Companies subject to Section 44475.2 will be required to provide website disclosure covering:

- All information regarding how, if at all, a "carbon neutral, "net zero" or similar claim was determined to be accurate or accurately accomplished;

- How interim progress toward such goals is being measured; and
- Whether the data and claims listed have been subject to third-party verification.

Cited examples of disclosure responsive to items 1 and 2 above include the use of third-party verification of all entity GHG emissions, identification of an entity's Science Based Targets initiative (SBTi) pathway and the relevant sector methodologies used for such targets.

Although ambiguous, the text of Section 44475.2 suggests that relevant climate claims include both **statements regarding historical achievements and forward-looking goals** (i.e., net zero or emissions-reduction targets). As a result, this provision potentially has an **extremely broad** scope, capturing not only companies that make claims regarding the net zero performance of their overall business, but also the much larger pool of companies that set climate goals, or make claims or set goals regarding individual products. In addition, relevant claims include anything that implies that a business or product has achieved a "significant" (undefined) reduction in emissions, potentially capturing many sustainability-related product marketing statements. The VCMDA does not specify what it means to operate in California or make claims within the state, though this may potentially cover all environmental, social and governance (ESG) publicity and product marketing statements by companies selling to California customers. Given the number of companies that sell into or otherwise operate in California and either set net zero targets or make claims regarding product emissions performance, Section 44475.2 disclosure obligations may potentially apply to a very significant percentage of US and international companies – public and private.

## Additional disclosure obligations regarding the use of climate offsets

Entities operating in California that make the types of climate claims covered by Section 44475.2 are subject to additional requirements under Section 44475.1 of the VCMDA if they purchase or use voluntary carbon offsets[1] sold within the state. Such entities must provide additional website disclosure related to offset purchases that specifies:

- Offset project types (i.e., whether the project offsets emissions via avoided emissions, such as through renewable energy or forest preservation projects, or through carbon capture/removal);
- Basic project information, such as the project name, identification number (if applicable), the entity selling the offset, and the offset registry or program;
- The protocol used to estimate emissions reductions or removal benefits; and
- Whether there is third-party verification of company data and claims listed.

Section 44475.1 does not specify whether disclosure must cover all offsets or just offsets sold within California – or what it means for offsets to be sold within the state. This may be a distinction without a difference to the extent that the latter covers all offset markets open to California purchasers. Under a broad interpretation, the requirements of Section 44475.1 would apply to the very large number of companies that purchase offsets and either set climate goals or make climate-performance claims.

## Disclosure obligations for offset sellers

Less broadly applicable than Sections 44475.1 and 44475.2, Section 44475 of the VCMDA imposes new disclosure obligations for entities that market or sell offsets within California. Covered entities will be required to provide website disclosure that specifies:

- Basic project information, such as offset types, protocols used, project start dates and timelines, and emission reduction/removal quantities;
- Annual updates regarding emissions reduced or removed;
- Whether the project meets any standards established by law or a nonprofit entity, or whether the project is subject to

independent expert or third-party validation of project attributes;

- Project durability (i.e., the period for which the project operator commits to maintaining emissions reduction or removal enhancements, if such period is less than the atmospheric lifetime of CO2 emissions);
- Any actions that will be taken, including but not limited to actions required by contractual obligation, if the relevant projects do not achieve future emissions reductions, or if carbon storage projects are reversed; and
- "Pertinent" data and calculation methods necessary to reproduce and verify emissions reduction or removal credit claims.

## Relation of the VCMDA to other ESG regulations

The VCMDA creates significant new disclosure obligations related to climate claims, goals and offsets that will apply to many US and international companies operating in California. For many such companies – including most US companies – these rules represent the first required disclosures regarding the basis for climate-related claims and offset purchases.

Nonetheless, the VCMDA reflects broader trends in US and international regulation, including a general trend of **anti-greenwashing enforcement** and proposed and adopted regulations covering **green claims** and the **use of offsets**. The VCMDA also comes in advance of potential updates to **US Federal Trade Commission Green Guides**, following a **solicitation of public comment this spring**, including regarding guidance related to offset, net zero, carbon-neutral and other climate-related claims.

Similar to the CCAP, Section 44475.2 overlaps with certain elements of the **Securities and Exchange Commission (SEC) climate proposal**, while potentially applying to a much broader pool of companies. Unlike the SEC proposal, the VCMDA applies to public and private companies and – unlike the CCAP – does not include any revenue thresholds. In addition to adoption in advance of the final SEC rules, the VCMDA will be effective more than a year in advance of even the earliest expected SEC disclosure obligations.

Similar to the VCMDA, under the SEC proposal, new Item 1506 of Regulation S-K would require disclosure of climate targets and goals – including units of measurement, time horizons, interim targets, annual progress updates and target-achievement strategies. In particular, this would include a requirement to disclose the role of offsets in any climate-related targets or goals –including details regarding renewable energy credits, such as purchase costs, the amounts of energy generated, project locations and any offset authentication. While there is significant overlap with the SEC proposal on these topics, the VCMDA includes a unique focus on historical and product-level claims that may have significant disclosure implications for many companies.

## Practical considerations

#### Navigating statutory ambiguity

As with the CCAP, the statutory text of the VCMDA is relatively brief and leaves several key concepts undefined – including what it means to "operate" in California, sell or market offsets "within" the state, or make climate-related claims within the state. Unlike the CCAP, the VCMDA does not specify that any particular regulatory agency will promulgate implementing resolutions under the statute, though the California attorney general and local prosecutors are responsible for prosecuting any civil actions under the statute. As a result, the California attorney general may receive requests to issue guidance regarding key ambiguous provisions of the statute, particularly its scope. In the absence of such guidance, many companies may choose to adopt conservative interpretations of the statute, assuming, for example, that "operating" and making claims "within" California covers any business that sells to customers in the state and makes climate-related claims in product marketing or in general ESG publicity.

#### Planning and inventory

With the VCMDA effective as of January 1, 2024, companies will need to act quickly to prepare for disclosure. In addition to assessing the applicability of the VCMDA in light of the above-discussed statutory ambiguities, legal teams should make a plan for preparing disclosures required by the VCMDA. This should include taking an inventory of climate-related claims and goals, as well as any offset purchases, and compiling all necessary information for disclosure under the VCMDA. In addition to compiling straightforward factual information, such as the details of offset purchases, and determining which data and claims have been subject to third-party verification, compliance preparation also may include more substantive items, such as formalizing interim goals and preparing narrative descriptions of control processes other than third-party verification and SBTi sector pathways.

**Extending climate governance**

The VCMDA highlights the importance of establishing legal oversight and controls covering climate-related activities beyond formal sustainability reporting – including offset purchases, product marketing statements and target setting. While liability concerns and the proliferation of sustainability reporting regulations have caused many companies to invest in robust controls for climate disclosures included in ESG reports or SEC filings, that oversight does not always extend to target-setting or marketing claims. Legal teams and boards should consider how to organize oversight of such matters, including integration into existing climate disclosure controls and board and management ESG oversight. In particular, the VCMDA emphasizes the importance of subjecting climate claims and goals to rigorous processes prior to publication, including claims made in product advertising. For many companies, an internal audit will play a key role in such efforts, as it has in formalizing climate-reporting programs. In addition to extending climate governance to matters such as product-focused climate claims, given VCMDA disclosure and increased scrutiny of offset quality, companies should evaluate the role of offsets in their climate strategies and consider enhancing governance and diligence for any offset purchases.

**Evaluating liability risks**

Penalties under the VCMDA are relatively low, with civil fines of not more than $2,500 for each day that required information is not made available or is inaccurate, with total penalties not to exceed $500,000. Nonetheless, by heightening attention on climate claims and goals, as well as the quality of offset purchases, and increasing company disclosure on such topics, the VCMDA may create a heightened risk of litigation related to such matters, including anti-greenwashing enforcement actions, private consumer litigation or securities fraud actions. As a result, passage of the VCMDA may prompt legal teams and boards to reevaluate the liability risks associated with climate-related statements included in product marketing or ESG publicity and to further invest in safeguards in these areas, including increased use of third-party verification. Anti-greenwashing scrutiny has caused many companies to reevaluate existing climate claims and goals, and the VCMDA may increase pressure on companies to amend or retract statements that cannot be substantiated or have lost plausibility.

If you have any questions, or would like support adjusting to this new reporting regime, please contact a member of **Cooley's international ESG & sustainability advisory team**.

**Notes**

1. The VCMDA defines "voluntary carbon offsets" as "any product sold or marketed in the state that claims to be a "greenhouse gas emissions offset," a "voluntary emissions reduction," a "retail offset" or any like term that connotes that the product represents or corresponds to a reduction in the amount of greenhouse gases present in the atmosphere or that prevents the emission of greenhouse gases into the atmosphere that would have otherwise been emitted.

## Key Contacts



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