

## How To Advertise Carbon Reductions Under New Calif. Law

By **Gonzalo Mon and Katie Rogers** (October 24, 2023, 3:34 PM EDT)

Although a growing number of companies are advertising their efforts to reach the status of carbon neutral or net zero, the standards for supporting those types of claims aren't very clear.

A law that was quietly signed by California Gov. Gavin Newsom on Oct. 7 — A.B. 1305, the Voluntary Carbon Market Disclosures Act, or VCMDA — aims to force companies to more clearly disclose the basis for their carbon reduction claims.

The VCMDA will take effect on Jan. 1, 2024, and could have a significant impact on any company that makes claims about carbon reduction.

### Background

Lawyers who review environmental claims in ads will first turn to the Federal Trade Commission's Green Guides when they have questions about how to support those claims, but the guides, which were last updated in 2012 and are now under review, don't always have clear answers.

On Dec. 14, 2022, the FTC invited the public to respond to a series of questions about green marketing, including whether the FTC should address claims related to carbon offsets or climate change, such as "carbon neutral" or "net zero." Updates to the Green Guides are still pending.

In the meantime, we've seen a number of lawsuits questioning how companies substantiate these types of claims. In May, plaintiffs filed a class action against Delta Air Lines Inc. in the U.S. District Court for the Central District of California.

The class alleged that the airline's carbon-neutral claims — such as "Carbon Neutral Since March 2020," and "you can feel confident that we will offset the carbon emitted from your flight with us" — are misleading because they are based on unreliable carbon offsets.

The complaint in *Mayanna Berrin v. Delta* does much more than challenge Delta's specific claims. The plaintiffs allege that there are "foundational issues with the voluntary carbon offset market" that render claims based on offsets inherently problematic.



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They argue that "nearly all offsets issued by the voluntary carbon market overpromise and underdeliver on their total carbon impact" and question whether such offsets can be used to substantiate a carbon-neutral claim.

The lawsuit is still pending, but the decision could have a significant impact on any company that makes claims based on the purchase of carbon offsets. In the meantime, companies will need to closely consider California's new law and the surrounding context.

### **The Voluntary Carbon Market Disclosure Act**

Facing an Oct. 14 deadline with more than 700 bills on his desk, Gov. Newsom spent the weekend of Oct. 7 signing hundreds of bills, including three that address environmental issues. One law that hasn't received much attention yet is the VCMDA.

The VCMDA requires companies that make claims regarding the achievement of net-zero emissions to disclose certain information on their websites pertaining to the greenhouse gas emissions associated with the claims.

These types of claims can include statements that the entity, a related entity or a product is carbon neutral or does not add net carbon dioxide or greenhouse gases to the climate, or has made significant reductions to its carbon dioxide or greenhouse gas emissions.

The information that must be disclosed on the company's website includes the following:

- All information documenting how, if at all, a carbon neutral, net zero emission or other similar claim was determined to be accurate or actually accomplished and how interim progress toward that goal is being measured. This information may include, but is not limited to, disclosure of independent third-party verification of the entity's greenhouse gas emissions, identification of its science-based targets for its emissions reduction pathway and disclosure of the relevant sector methodology and third-party verification used for the science-based targets and emissions reduction pathway.
- Whether there is independent third-party verification of the company data and claims listed.

This provision is applicable to all companies that operate in California and make these claims outside of California, or who make these claims within California.

Notably, the law does not define what it means to "operate" in California and "make claims" in the state, but we expect those terms to be interpreted broadly. This provision is not limited to claims based on voluntary carbon offsets.

In addition, companies that operate in California and make the types of claims described above based on the use of voluntary carbon offsets, or who make these claims outside of California based on the use of voluntary carbon offsets purchased in California, must make the following additional disclosures on the website for each applicable project or program:

- The name of the entity selling the offset and the offset registry or program;

- The project identification number, if applicable;
- The project name as listed in the registry or program, if applicable;
- The offset project type, including whether the offsets purchased were derived from a carbon removal, an avoided emission or a combination of both, and the site location;
- The specific protocol used to estimate emissions reductions or removal benefits; and
- Whether there is independent third-party verification of company data and claims listed.

All of the disclosures required by the VCMDA must be updated at least once per year. The law doesn't explicitly require that companies make any disclosures on marketing materials that include the triggering claims, but we expect challengers to argue that companies must at least point to those disclosures whenever they make the claims for specific products or services.

The law allows civil fines of up to \$2,500 per day, for each day that information is not available or is inaccurate on its website, for each violation, up to a maximum penalty of \$500,000.

Civil actions could be brought by the California attorney general or by a California district attorney, county counsel or city attorney. Fortunately for companies, there is no private right of action.

### **Next Steps**

As we noted above, the VCMDA will take effect Jan. 1, 2024, which doesn't leave a lot of time to comply. Here are some things companies should do over the next few months:

- Assess whether the company is making any of the claims covered by the law. Keep in mind that advertising plans change quickly, so you'll need to do this periodically and be prepared to adapt.
- Ensure that all claims are substantiated. If claims are about what the company plans to achieve in the future, make sure there is a good plan in place and that the company has reliable ways to measure its progress.
- If you purchase voluntary carbon offsets, make sure you obtain all of the information that you are going to need in order to make the disclosures specified above.
- Consider whether it makes sense to engage a third party to independently verify claims and substantiate data.

The threat of penalties for every day of noncompliance with the laws suggests that companies should start on these steps right away.

Outside of California, companies are anxiously awaiting to see what the FTC's upcoming revisions to the Green Guides will require. We expect that there will be at least one or two upcoming workshops on specific claims, including carbon-reduction claims.

These developments send a clear signal to companies that environmental efforts and claims touting these efforts should be supported and transparent.

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