New California Law Regulates Carbon Claims

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Green is the new black, or so it seems, based on the growing number of companies that are making "green" claims. Claims about carbon reductions are particularly in fashion, both with advertisers and with a growing number of challengers who are questioning the basis for those claims. Some lawsuits even allege that there are "foundational issues with the voluntary carbon offset ("VCO") market" – the principle means for substantiating those claims – that render "claims based on offsets inherently problematic."

A law that was quietly signed by California Governor Newsom on Saturday – the Voluntary Carbon Market Disclosure Act (or "VCMDA") – aims to force companies to more clearly disclose the basis for their carbon reduction claims. The VCMDA takes effect on January 1, 2024.

The VCMDA requires that companies who make claims (1) regarding the achievement of net zero emissions, (2) that the entity, a related or affiliated entity or a product is "carbon neutral," or (3) implying the entity, a related or affiliated entity or a product 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, to disclose on their websites the following information pertaining to the greenhouse gas emissions associated with the claims:

- 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, (1) disclosure of independent third-party verification of the entity's greenhouse gas emissions, (2) identification of its science-based targets for its emissions reduction pathway and (3) 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 companies who operate in California and make these claims outside of California, or who make these claims within California. It is not limited to claims based on VCOs.

In addition, companies who operate in California and make the types of claims described above based on the use of VCOs, or who make these claims outside of California based on the use of VCOs purchased in California, must make 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.
- Whether there is independent third-party verification of company data and claims listed.

All of the required disclosures must be updated at least once per year. (It's unclear from a plain reading of the law whether a website or QR code link to the required disclosures will need to be included in ads for products making these claims or if having it on the website will be sufficient.)

The law also requires companies who market or sell VCOs in California to disclose certain information about the underlying projects on their websites.

Entities that violate the disclosure requirements could be subject to a civil penalty of not more than $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. There is no private right of action.

California has been particularly active with carbon-related legislation this week. Governor Newsom also signed two other related laws – the Climate Corporate Data Accountability Act and the Climate-Related Financial Risk Act – on Saturday.

The Climate Corporate Data Accountability Act requires large public and private companies doing business in California to disclose their scope 1, 2, and 3 emissions, beginning in 2026. Scope 1 emissions are those that result directly from a company's activities, while scope 2 are those released indirectly. Scope 3 includes all indirect emissions produced from a company's entire supply chain. Scope 3 emissions reporting would not be required until 2027 on 2026 data.

The Climate-Related Financial Risk Act requires certain entities doing business in California to prepare and submit climate-related financial risk reports that cover climate-related financial risks consistent with recommendations from the Task Force on Climate-Related Financial Disclosure ("TCFD") framework.

These new California laws, along with the FTC's revisions to the Green Guides and the SEC's proposed climate risk disclosure rules, both of which are expected to be finalized soon, send a clear signal to companies that environmental efforts and claims touting these efforts should be supported and transparent. Companies should prepare for increased scrutiny related to environmental claims in the near future.