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New California Law Imposes Anti-Greenwashing Disclosure Requirements Starting January 2024: Voluntary Carbon Market Disclosures Act (AB 1305)

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Introduction

While California's Climate Accountability Package has received much recent attention, another California climate disclosure bill targeting corporate greenwashing was also signed into law on October 7, 2023, and its obligations begin in six weeks (January 1, 2024). The Voluntary Carbon Market Disclosure Act, AB 1305, has two components. It focuses on voluntary carbon offsets, and establishes disclosure requirements surrounding the marketing, buying, and selling of offsets. In addition, if any company operating in California has made any claims that the entity and/or any of its products do not add greenhouse gases to the climate or that it has significantly reduced its emissions, then it must meet detailed reporting requirements starting January 1, 2024.

Scope & Requirements

AB 1305 imposes disclosure requirements on entities that operate within California¹ and make claims of "net zero," "carbon neutral," or similar claims regarding the elimination or significant reduction of a company's GHG emissions.² It also creates more comprehensive disclosure requirements for entities marketing, buying or selling carbon offsets in California.

Voluntary carbon offsets are broadly defined as any product sold or marketed in California that claims to be a "greenhouse gas emissions offset," a "voluntary emissions reduction," a "retail offset," or any similar term, connoting that the product represents or corresponds to a reduction in the amount of greenhouse gases present in the atmosphere, or prevents emissions to the atmosphere.³ These reporting obligations are required on the respective companies' websites, and no reporting to any government authorities is currently required under AB 1305.

Entities that make claims that they "[do] not add net carbon dioxide or greenhouse gases . . . to the climate or ha[ve] made significant reductions to [their] carbon dioxide or greenhouse gas emissions,"⁴ will have to disclose the following information on their website:

- How the claim was determined to be accurate or accomplished and how interim progress towards the goal is being measured;⁵ and
- Whether there is independent third-party verification of the company data and claims made.⁶

Entities that market or sell carbon offsets within California will have to disclose, on their websites, details regarding the carbon offset project,⁷ accountability measures if the project is not completed or does not meet the projected emissions reductions,⁸ and the data and calculation methods needed to reproduce and verify the number of credits issued.⁹

Entities that purchase or use carbon offsets and make claims that they do not add GHGs to the climate, or that they have significantly reduced their GHG emissions, will have to provide information on their website regarding the carbon offset program and whether there is third-party verification of the claims made by the company.¹⁰

Timeline

AB 1305's disclosure requirements become effective on January 1, 2024. Entities that are not in compliance can be fined up to \$2,500 a day with a maximum penalty of \$500,000.¹¹ There is no direct ability for private third parties to sue, but the government (e.g., the California Attorney General or a district attorney) can bring a civil action to enforce penalties on violators.¹²

Uncertainties & Potential Changes

- AB 1305's disclosure requirements for entities making such claims apply to entities that "operate in the state" and "make claims within the state."¹³ "Operate in the state" is not defined. There is therefore substantial uncertainty about whether entities with limited presence in California (a small subsidiary, for example) will need to comply with the law.
- Disclosure requirements trigger if entities make certain claims regarding their efforts to reduce their carbon footprint. "Claims" is not defined—and thus there is substantial uncertainty as to how "make claims" would be interpreted and what type of communication would trigger the requirements. For example, statements in company marketing materials, a private presentation, or telephone or Zoom call could constitute a "claim."
- Disclosure requirements trigger if an entity makes claims that it "has made significant reductions to its carbon dioxide or greenhouse gas emissions." "Significant reductions" has not been defined, and therefore could potentially include any statement regarding the lowering of an entity's carbon emissions.
- It is also unclear whether the significant reductions are assessed only against a specific entity's emissions or the emissions of all affiliated entities or indeed across the relevant sector.
- Many of the disclosures required under AB 1305 require or suggest "third party verification".¹⁴ Since "third party verification" is not defined, it is unclear what level of review will be sufficient. Standards for third-party assurance set forth in SB 253 (Climate Corporate Data Accountability Act), California's new law requiring disclosure of entities' emissions, may provide guidance for the standards for third-party verification under AB 1305.

Conclusion

AB 1305 applies to entities that market, buy, or sell carbon offsets or make emission reduction claims—regardless of their size—with compliance required starting January 1, 2024. While the law is likely to be challenged in court and state regulations may modify or expand the reporting obligations, clarify the requirements, or delay implementation, entities that operate in California and make such claims need to move immediately to prepare to comply with AB 1305. This preparation should include carefully

determining the location and content of specific disclosures on company websites, reports, filings, and materials (including advertisements and promotional materials), and whether they are independently verified by a third party. Companies should also prepare and hold readily available documentation to support all disclosures. Additionally, companies should consider developing internal policies to ensure company statements regarding emissions are reviewed to determine whether those statements may subject the company to additional reporting and verification requirements.

Given the potential breadth of entities covered and statements qualifying as “claims,” entities operating and making claims in California should err on the side of caution and provide disclosures if they reasonably believe they could be required to do so in order to avoid penalties. Experienced counsel can assist in evaluating any current climate-related claims being made by companies, preparing an inventory of carbon-related claims, effectively project-managing third-party verification, and counseling in respect of any potential disclosure, due diligence, and system development obligations posed by this new law.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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- ¹ Currently there is no clear definition of what this means.
 - ² Claims about avoided emissions are not specifically covered. However, claims about avoided emissions that amount to claims about “net zero,” “carbon neutral,” or “significant reductions in GHG emissions” would be covered. Specifically, the law covers claims “implying the entity . . . does not add net greenhouse gases to the climate or has made significant reductions to its carbon dioxide or greenhouse gas emissions.” HSC 44475.1; HSC 44475.2. While these provisions don’t explicitly mention avoided emissions, a claim that an entity has avoided emissions could fall under either the “does not add net gases” or “has made significant reductions” prongs. The only explicit mention of avoided emissions is in reference to disclosing the type of offset project. Therefore, not all claims about avoided emissions are covered; rather covered are those that fall under either of these prongs or relate to claims about net zero or carbon neutrality.
 - ³ California Health & Safety Code (HSC) 44475.2(d)(3).
 - ⁴ HSC 44475.2.
 - ⁵ HSC 44475.2(a).
 - ⁶ HSC 44475.2(b).
 - ⁷ Including, but not limited to, the location of the site, the timeline of the project, and the amount of carbon removed on an annual basis.
 - ⁸ HSC 44475(b). The timing of such failures would likely be project-specific, i.e., when a project is scheduled to be completed or when a certain emissions reduction target is scheduled to be hit.
 - ⁹ HSC 44475(c).
 - ¹⁰ HSC 44475.1.
 - ¹¹ HSC 44475.3(a).
 - ¹² *Id.*
 - ¹³ HSC 44475.1(g); HSC 44475.2(c).
 - ¹⁴ See, e.g., 44475.2(a).

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