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Legal Update

New California Anti-Greenwashing Law Goes Live on January 1, 2024 – What you need to know if you make certain "green" claims.

California recently passed the Voluntary Carbon Market Disclosures Act (AB 1305) (VCMDA). The new "anti-greenwashing" law is one of the first laws in the U.S. to not only regulate the voluntary carbon market, but also require entities – both public and private – to provide publicly available disclosures aimed at increasing transparency and accountability around certain climate-related claims and the use of voluntary carbon offsets (VCOs).

The VCMDA is part of the recent flurry of climate-related disclosure laws passed in California. The two other laws, which arguably received more publicity, were the Climate Corporate Data Accountability Act (SB 253) relating to emissions disclosures and the Climate-Related Financial Risk Act (SB 261) relating to climate-related financial risks. (We discussed those two laws in our other client alert, which can be found here – *New "Climate Reporting" Laws in California – Emissions and Climate-Related Financial Risk Disclosure Required*.)

Unlike the two other California climate-related laws, which have longer phase-in periods, the VCMDA goes into effect on January 1, 2024.

This legal update provides a high-level overview – in Q&A format – of the new law, its potential impact and what entities that are subject to the legislation should be doing to prepare.

What is the new law called?

The law took the form of California Assembly Bill 1305 and is known as the Voluntary Carbon Market Disclosures Act, which we refer to in this legal update as the VCMDA.

When does the law go into effect?

The VCMDA takes effect on January 1, 2024, which means that covered entities have less than a month to prepare for compliance. In contrast, under both SB 253 (emissions disclosures) and SB 261 (climate-related financial risk disclosures), covered entities do not need to begin making disclosures until 2026.

Which entities are subject to the VCMDA and what disclosure is required?

The VCMDA applies to both public and private entities, and does not include revenue or other eligibility thresholds. It also does not distinguish between U.S. and non-U.S. entities. Therefore, as long as an entity meets the California nexus requirements (as to which there are potential ambiguities, as we note below), both public and private and U.S. and non-U.S. entities will be subject to the law.

The following table provides more information about the various disclosure and other requirements:

	Covered Entity	**Required Disclosure From Covered Entity**
(a)	Any entity that makes claims within California: (i) relating to (x) its achievement of "net zero" emissions or (y) it, a related or affiliated entity, or product being "carbon neutral," or (ii) implying it, a related or affiliated entity, or product (x) does not add net carbon dioxide (CO_2) or greenhouse gas (GHG emissions) to the climate or (y) has made significant CO_2 or GHG emissions reductions. Excluded Entities: those that do not "operate" or "make claims" within California, which we discuss further below.	(i) Disclosure relating to GHG emissions associated with its claims, including: • all information regarding how the claims were determined to be accurate or actually accomplished; • how it measures its interim progress toward its its "carbon neutral", "net zero emissions" or any similar goal; and • whether there is an independent third-party verification of the company data and claims. (ii) Disclosure may include: • identification of science-based targets; and • relevant sector methodology.
(b)	Any entity that purchases or uses VCOs within California ***and*** makes any of the following claims: (i) relating to (x) its achievement of "net zero" emissions or (y) it, a related entity or product being "carbon neutral," or (ii) implying it, a related entity or product (x) does not add net CO_2 or GHGs to the climate or (y) has made significant CO_2 or GHG emissions reductions. Excluded Entities: those that do not "operate," or do not purchase or use VCOs solid, within California, which we discuss below.	(i) Disclosure relating to each project or program, such as the offset seller name and registry or program; the project identification number, name, type and location; and the protocol used to estimate the emissions benefits. (ii) Disclosure regarding whether there is an independent third-party verification of the company data and claims.

	Covered Entity	Required Disclosure From Covered Entity
(c)	Any entity that markets or sells VCOs within California	(i) Disclosure relating to the VCO project, such as the protocol used to estimate the emissions reductions or removals benefits; the project type, location, timeline, start date and verification status; and the annual emissions reduced or carbon removed by the project. (ii) Disclosure relating to the accountability measures it will take if the project does not meet its projected emissions reductions or removal benefits or is not completed. (iii) Disclosure relating to the data and calculation methods it uses to independently verify the number of emissions reduction or removal credits issued.

Where must a covered entity's disclosure be made?

Disclosures must be made on the covered entity's website.

How often is the disclosure required to be updated?

A covered entity must update its disclosures at least annually.

What are the consequences of non-compliance with the VCMDA?

Civil penalties may be assessed on a per-violation and per-day basis. The penalty for each violation is up to $2,500 for each day that required information is not available or is inaccurate, up to a maximum of $500,000 per violation.

Why else is the VCMDA significant?

The VCMDA represents a significant development in the voluntary carbon market and climate disclosure landscape given its potentially broad scope and the extensive nature of the disclosures required. It reflects California's initiative in seeking to address climate-change and energy transition considerations by requiring disclosure to reduce risks around "greenwashing."

Further, the new law signals the growing appetite of consumers – and potentially investors – for greater information, transparency and accountability around carbon footprint and other climate-related claims made by entities, and a recognition of the role of VCOs in achieving climate goals. The law is also intended to provide informational tools for consumers and investors to evaluate VCO projects and programs. This includes being better equipped to compare and verify the emissions benefits and standards of different VCOs, and avoid purchasing or using VCOs that are ultimately unreliable or ineffective in actually reducing emissions.

Are there any ambiguities to be aware of?

The VCMDA appears to create some ambiguity as to which California-related activities may make entities subject to the disclosure requirements. As noted, the law does not apply in key respects if entities do not operate in California or make claims, or purchase or use VCOs sold, in California.

WHAT DOES "OPERATE" IN CALIFORNIA MEAN?

The new law does not define what it means to "operate" in California. Although there is speculation that "operate" possibly involves the same concepts as the more familiar standard of "doing business" in California that was adopted by the other climate laws (SB 253 and SB 261), the VCMDA does not use the same terminology. Therefore, it remains to be seen how "operating" in California may be interpreted or defined. For the moment at least, it might be advisable for businesses that otherwise meet California "doing business" requirements to consider themselves to also be meeting the "operating" in California requirements of the VCMDA. (Please see our previous client alert on what it means to be "doing business" in California – *Are You "Doing Business" in California?*.)

WHAT DOES "MAKING CLAIMS" WITHIN CALIFORNIA MEAN?

The VCMDA also does not provide a definition of what "making claims" means. As such, it is not clear how "making claims" within California may ultimately be interpreted. For example, does an entity need to be purposefully directing claims to California residents? At an extreme, the VCMDA could, without clarification, risk potentially capturing entities regardless of size that make claims on their website, which, while not intended to be directed at California residents, are technically generally accessible through the internet to California residents.

WHEN MUST INITIAL DISCLOSURES ACTUALLY BE MADE?

While the VCMDA goes into effect on January 1, 2024, it does not (unlike SB253 on emissions disclosure and SB261 on climate-related financial risk disclosure) identify when covered entities must make their initial disclosures. In the absence of clarification, covered entities should be prepared to make their initial disclosures at the beginning of 2024.

WHICH THIRD-PARTY STANDARDS APPLY?

The VCMDA does not identify or endorse any third-party standards for covered entities to reference when preparing the required disclosure. It remains to be seen the extent to which existing third-party standards, such as the Claims Code of Practice issued by the Voluntary Carbon Market Integrity Initiative or Core Carbon Principles of the Integrity Council for the Voluntary Carbon Market, will be used (if at all) for purposes of further clarifying the VCMDA or aiding in its enforcement.

ARE THERE ANY IMPLEMENTING OR CLARIFYING REGULATIONS EXPECTED TO HELP RESOLVE AMBIGUITIES?

The VCMDA does not call for implementing or clarifying regulations and, to date, no indication has been provided that any will be forthcoming. Therefore, if an entity believes it risks falling within the scope of the law as currently drafted, it should begin preparing to comply with the requirements. In the absence of clarifying regulations, entities will have to wait and see how non-compliance is prosecuted, and whether those cases provide insight into resolving some of the areas of uncertainty.

What should entities be doing ahead of the imminent January 1, 2024 effective date?

Any entity (whether public or private and whether organized in the U.S. or outside the U.S.) that believes it may be subject to the VCMDA (i.e., operating in California and making claims within California) should begin preparing to comply with the disclosure requirements of the VCMDA. Steps entities can take to prepare include:

- Review and take inventory of public- or consumer-facing claims (e.g., in marketing materials, sustainability reports or websites), including the extent to which they can reasonably be viewed as being made to persons in California.
- For claims potentially captured by the VCMDA:
  - review support, including any third-party verification, for such claims;
  - consider the extent to which claims should be modified and/or removed from public- or consumer-facing materials; and
  - prepare high-level disclosures to be posted to the entity's website to comply with the VCMDA requirements on or prior to January 1, 2024.
- Begin developing internal controls and procedures to monitor claims made, and to prepare for annual disclosure updates in order to avoid potential penalties.

Are there any other notable carbon offset bills on the horizon in California?

It is worth noting that on the same day California Governor Newsom signed the VCMDA into law, he vetoed another carbon-related law, Senate Bill 390 – also known as the Voluntary Carbon Offsets Business Regulation Act (SB 390). SB 390 would have gone further than the VCMDA and imposed civil liability on a person issuing, marketing or selling a VCO if the person knew or should have known that the GHG reductions related to the project were unlikely to be "quantifiable, real, and additional." In a letter explaining the veto, the Governor noted that while he supported greater transparency around the sale of VCOs and addressing the problem of "so-called 'junk offsets,'" SB 390 as drafted could ultimately capture well-intentioned sellers and verifiers of VCOs, possibly creating "significant turmoil" in the carbon offsets market. The Governor's letter increases the likelihood that California could see a revised SB 390-type bill introduced in the next legislative season.

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